CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 505

GEORGE C. HOLMBERG, FRANK C. BALL, CARL J. EASTERBERG, ET AL., ON BEHALF OF THEMSELVES AND ALL OTHER CREDITORS OF THE SOUTHERN MINNESOTA JOINT STOCK LAND BANK OF MINNEAPOLIS, PETITIONERS,

vs.

CHARLES ARMBRECHT AND GILBERT MILLER, BARBARA RICHARDS MICHEL, ET AL., AS EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF JULES S. BACHE, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 12, 1945.

CERTIORARI GRANTED NOVEMBER 19, 1945.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 505

GEORGE C. HOLMBERG, FRANK C. BALL, CARL J. EASTERBERG, ET AL., ON BEHALF OF THEMSELVES AND ALL OTHER CREDITORS OF THE SOUTHERN MINNESOTA JOINT STOCK LAND BANK OF MINNEAPOLIS, PETITIONERS,

vs.

CHARLES ARMBRECHT AND GILBERT MILLER, BARBARA RICHARDS MICHEL, ET AL., AS EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF JULES S. BACHE, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Print
Proceedings in U. S. C. C. A., Second Circuit	1
Statement under Rule 13	1
Record from D. C. U. S., Southern New York	3
Summons	3
Complaint	4
Answer	14
Statement of evidence	17
Appearances	17
Stipulations and concessions	18
Deposition of Morton F. Stern	22
Testimony of Charles Armbrecht, Jr.	29
Deposition of Charles Armbrecht, Sr.	30

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 29, 1945.

Record from D. C. U. S., Southern New York—Continued
Statement of evidence—Continued Print
Testimony of Clarence Fried 33
Motion to dismiss as to J. S. Bache & Co., and ruling thereon 61
Motion to dismiss as to Charles Armbrecht and ruling thereon 64
Testimony of Morton F. Stern 67
William Graham 71
Charles Armbrecht, Jr. (recalled) 76
Morton F. Stern (recalled) 78
Plaintiff's Exhibit 1—Stub of certificate No. 7079 for 50 shares issued to Charles Armbrecht 80
Plaintiff's Exhibit 2—Stub of certificate No. 7080 for 50 shares issued to Charles Armbrecht 81
Plaintiff's Exhibit 3—Page of ledger of bank re account of Charles Armbrecht 82
Plaintiff's Exhibit 4—Ledger sheet of J. S. Bache & Co., entitled "Southern Minnesota Joint Stock Land Bank of Minneapolis" 83
Plaintiff's Exhibit 5—Complaint in action of Holmberg, et al. v. Anchell, et al. 84
Plaintiff's Exhibit 6—Letter from U. S. Marshal with check enclosed, dated May 18, 1937 84
Plaintiff's Exhibit 7—Envelope addressed to Charles Armbrecht, marked Registered Mail, etc. 85
Plaintiff's Exhibit 8—Affidavit of mailing, dated August 23, 1932 85
Plaintiff's Exhibit 9—Letter dated October 19, 1935, addressed to Charles Armbrecht 86
Plaintiff's Exhibit 10—Letter dated October 1, 1935, addressed to Charles Armbrecht 87
Plaintiff's Exhibit 11—Letter dated October 8, 1935, from Charles Armbrecht to Franklin S. Wood 88
Defendant's Exhibit "A"—Certificate of stock for 10 shares to the order of J .S. Bache & Co., dated December 9, 1925 90
Defendant's Exhibit "B"—Certificate of stock for 80 shares to the order of J. S. Bache & Co., dated February 11, 1924 93
Defendant's Exhibit "C"—Certificate of stock for 10 shares to the order of J. S. Bache & Co., dated November 17, 1925 96
Findings of fact, conclusions of law and opinion 99
Judgment 105
Notice of appeal 107
Order amending finding No. 6 109
Stipulation as to record 111
Clerk's certificate 112
Opinion, Clark, J. 113
Judgment 122
Order granting petition for certiorari 124

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT

GEORGE C. HOLMBERG, FRANK C. BALL, CARL J. EASTERBERG, GEORGE F. HARDIE and PAT B. MORRIS, on behalf of themselves and all other creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis,

Plaintiffs-Appellees,

against

CHARLES ARMBRECHT; GILBERT MILLER, BARBARA RICHARDS MICHEL, MURIEL RICHARDS PERSHING and DOROTHY RICHARDS HIRSHON, as Executors under the Last Will and Testament of Jules S. Bache, deceased,

Defendants-Appellants.

Statement Under Rule 13.

This action was commenced by the service of a summons and complaint on defendant Jules S. Bache, now deceased, on November 17, 1943, and on defendant Charles Armbrecht on November 18, 1943. Issue was joined by the service of defendants' answer on December 1, 1943. Plaintiffs' attorney is Franklin S. Wood of 20 Exchange Place, Borough of Manhattan, City of New York, and the defendants' attorneys are Cook, Lehman, Goldmark & Loeb, of 20 Pine Street, Borough of Manhattan, City of New York.

Jules S. Bache died on March 24, 1944. By stipulation and order dated April 27, 1944, Gilbert Miller, Barbara Richards Michel, Muriel Richards Pershing and Dorothy

Richards Hirshon, executors under the Last Will and Testament of Jules S. Bache, deceased, were substituted as parties defendant herein. The stipulation further provided that the complaint be amended to include appropriate allegations alleging that the original defendant named herein died on March 24, 1944; that Letters Testamentary were duly issued by the Surrogate of New York County to the aforenamed executors on March 30, 1944; that the complainants would not be required to file or serve an amended complaint and that the answer of defendant JULES S. BACHE, deceased, to the original complaint should stand as the answer of the executors without the service of an amended answer.

This action came on for trial before Honorable John W. Clancy, District Judge, without a jury, on October 10 and 16, 1944. A decision in favor of defendant Stern dismissing the complaint as to him and in favor of the plaintiffs against the defendants executors and Armbrecht was rendered by the court and findings of fact and conclusions of law were made on November 1, 1944, and a judgment thereon was entered on November 10, 1944. The judgment directs that plaintiffs recover from said defendants the sum of $10,045.06 and that as between defendant Charles Armbrecht and defendants Gilbert Miller, Barbara Richards Michel, Muriel Richards Pershing and Dorothy Richards Hirshon, as executors of the Last Will and Testament of Jules S. Bache, deceased, defendant Charles Armbrecht shall be secondarily liable and defendants Gilbert Miller, Barbara Richards Michel, Muriel Richards Pershing and Dorothy Richards Hirshon, as such executors, shall be primarily liable. Notice of appeal on behalf of defendants executors and Armbrecht was filed on November 22, 1944.

Summons.

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

GEORGE C. HOLMBERG, FRANK C. BALL, CARL J. EASTERBERG, GEORGE F. HARDIE and PAT B. MORRIS on behalf of themselves and all other creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis,
Complainants,

against

JULES S. BACHE and CHARLES ARMBRECHT,
Defendants.

Civil Action, File No. 23-247

To the above named Defendants:

You are hereby summoned and required to serve upon Franklin S. Wood, Complainants' attorney, whose address is 20 Exchange Place, New York, N. Y., an answer to the complaint which is herewith served upon you, within 20 days after service o this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

GEORGE J. H. FOLLMER.

Dated: November 13, 1943.

Complaint.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK

GEORGE C. HOLMBERG, FRANK C. BALL, CARL J. EASTERBERG, GEORGE F. HARDIE and PAT B. MORRIS on behalf of themselves and all other creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis,
Complainants,

against

JULES S. BACHE and CHARLES ARMBRECHT,
Defendants.

Complainant George C. Holmberg, a citizen and resident of the State of Minnesota, residing in Hennepin County in said State, and complainants Frank C. Ball, Carl J. Easterberg, George F. Hardie and Pat G. Morris, who are residents and citizens of the State of ~~Illinois~~, on behalf of themselves and all other creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis, Minnesota, for this their bill of complaint against the above-named defendants, respectfully represent as follows:

FIRST: This is a suit of a civil nature. The jurisdiction of this Court is based upon the fact that the present suit arises under the Act of Congress of the United States known as the Federal Farm Loan Act (U. S. C. A., Title 12, Chapter 7); the fact that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000); and the fact that the matter in controversy is between citizens of different states.

SECOND: Prior to the 30th day of June, 1923, The Southern Minnesota Joint Stock Land Bank of Redwood Falls and The First Joint Stock Land Bank of Minneapolis were joint stock land bank corporations incorporated, organized and existing as such under and by virtue of an Act of Congress of July 17, 1916, as amended by Act of Congress of March 4, 1923, known as the Federal Farm Loan Act (U. S. C. A., Title 12, Chapter 7). The said The Southern Minnesota Joint Stock Land Bank of Redwood Falls had an authorized capital stock of One Million Three Hundred Thousand Dollars ($1,300,000.00) and the said The First Joint Stock Land Bank of Minneapolis had an authorized capital stock of Five Hundred Thousand Dollars ($500,000.00), and both said Banks were engaged in the business of joint stock land banks in the State of Minnesota as provided by said Act of Congress.

THIRD: Heretofore, on or about the 30th day of June, 1923 by virtue of an agreement made at that time between the said The First Joint Stock Land Bank of Minneapolis and said The Southern Minnesota Joint Stock Land Bank of Redwood Falls, and pursuant to the provisions of said Federal Farm Loan Act, and by the consent and authority of the Federal Farm Loan Board, the said The First Joint Stock Land Bank of Minneapolis was merged or consolidated with the said The Southern Minnesota Joint Stock Land Bank of Redwood Falls, and became a part of it, and the said The First Joint Stock Land Bank of Minneapolis ceased doing business as such bank and delivered all of its assets to the said The Southern Minnesota Joint Stock Land Bank of Redwood Falls, and the said The Southern Minnesota Joint Stock Land Bank of Redwood Falls assumed and agreed to pay and become obligated to pay and perform all of the corporate liabilities and obligations of the said The First Joint Stock Land Bank of Minneapolis.

FOURTH: Thereafter, on the 25th day of October, 1926, the said The Southern Minnesota Joint Stock Land Bank of Redwood Falls changed its corporate name to that of The Southern Minnesota Joint Stock Land Bank of Minneapolis and on November 20, 1926, to that of Southern Minnesota Joint Stock Land Bank of Minneapolis.

FIFTH: Prior to said consolidation of said Banks as above alleged, both said The First Joint Stock Land Bank of Minneapolis and said The Southern Minnesota Joint Stock Land Bank of Redwood Falls had assumed and incurred obligations to creditors and had issued bonds in accordance with the provisions of said Federal Farm Loan Act, and there are outstanding at this time bonds issued by said The First Joint Stock Land Bank of Minneapolis, the obligation of which was assumed by Southern Minnesota Joint Stock Land Bank of Minneapolis, and bonds issued by the latter under its former name of The Southern Minnesota Joint Stock Land Bank of Redwood Falls. All of said bonds are obligations and liabilities of The Southern Minnesota Joint Stock Land Bank of Minneapolis, and whenever reference is made herein to the bonds or other obligations of Southern Minnesota Joint Stock Land Bank of Minneapolis, it is intended to include and includes all bonds and obligations for the payment of which the said Bank is obligated, whether by virtue of having issued, sold and delivered said bonds or incurred said obligations or by virtue of having assumed payment of the same.

SIXTH: Said Southern Minnesota Joint Stock Land Bank of Minneapolis and its predecessors issued bonds which are now outstanding having a face value of Twenty-one Million Thirty-eight Thousand and Seven Hundred Dollars ($21,038,700.00) and all of said bonds were sold to complainants and the public for their par value or approxi-

mate par value and the proceeds thereof were invested for the most part in farm mortgages covering farm properties situated in Minnesota and elsewhere. In addition thereto, there are outstanding and unpaid obligations incurred or assumed by said Bank, not represented by bonds, in a considerable amount, the exact amount of which is unknown to your complainants.

SEVENTH: Said Southern Minnesota Joint Stock Land Bank of Minneapolis has outstanding capital stock of the par value of Three Million Dollars ($3,000,000.00) divided into Thirty Thousand (30,000) shares of the par value of One Hundred Dollars ($100) each. Said shares were originally sold for approximately Three Million Dollars ($3,000,000) in cash, which sum was paid into the treasury of said Bank.

EIGHTH: Complainants are creditors of said Southern Minnesota Joint Stock Land Bank of Minneapolis. The complainant, Frank C. Ball, is the owner of upwards of Four Thousand Dollars ($4000) face or par value of farm loan bonds issued or assumed by said Bank, and the complainants jointly are trustees for the holders and owners of upwards of Thirteen Million Dollars ($13,000,000) face or par value of farm loan bonds issued or assumed by the Southern Minnesota Joint Stock Land Bank of Minneapolis, the principal amount of which has not been paid. The complainants as such trustees have the duty and right to exercise for the benefit of such beneficiaries every power and authority vested in such beneficiaries by the terms of said Bonds and said Federal Farm Loan Act, and to represent said beneficiaries in respect of said bonds as fully as though the respective beneficiaries were acting in person, and complainants as such trustees are vested with all the rights, powers and privileges of owners of said bonds.

NINTH: The defendant Charles Armbrecht was the record owner of 100 shares of stock of the par value of $10,000, in the Southern Minnesota Joint Stock Land Bank of Minneapolis on May 2, 1932.

TENTH: The defendant Jules S. Bache is the beneficial owner of the 100 shares of stock held in the name of Charles Armbrecht which he knowingly, willfully, and fraudulently caused to be placed in the name of Charles Armbrecht as a nominal party or "Dummy" for the express purpose of avoiding the stockholders' liability imposed by Section 812 U. S. C. A. Title 12, Chapter 7, and to defraud the complainants and other creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis.

ELEVENTH: Complainants, promptly after investigation, had made it appear that assets of the Southern Minnesota Joint Stock Land Bank of Minneapolis might be insufficient to meet its liabilities, and that the stockholders might be liable to an assessment therein, and on or about July 28, 1932 commenced an action in the District of Minnesota, Fourth Division, wherein said bank was located on their own behalf, and on behalf of all creditors of said Bank for an adjudication of the insolvency of the Bank and the necessity of an assessment against the stockholders thereof, personally against stockholders resident in said district and against whom personal process could issue, and by mail againt all stockholders of said bank who were non-residents of said district, and proceeded with all due diligence to prepare and try said action. The said action came on to be heard by Honorable Gunnar Nordbye and a decision was rendered by him thereon on or about April 20, 1935, said decision holding that the bank was insolvent and that an assessment of 100% was necessary, and the decree entered thereon, provided for the appointment of an equity receiver to collect and distribute among creditors of said

Bank the sums received from stockholders thereof, both in the District of Minnesota and elsewhere. Complainants, in aid of such decree and with all due diligence, thereafter instituted proceedings in the Southern District of New York on or about December 11, 1935, for the appointment of an ancillary equity receiver who would thereby be enabled on behalf of all creditors to sue the several stockholders in said district in actions at law, to collect any recoveries or payments thereon and to remit the same to the primary receiver for distribution to the creditors entitled thereto, naming as defendants said Bank, the primary receiver and three stockholders. Said proceedings were opposed by one of said stockholders, and a motion was made to dismiss the bill, which was denied by order of Honorable Robert P. Patterson therein dated April 23, 1936. Appeal was taken therefrom by said defendant and said order and decree were, on such appeal, reversed by the Circuit Court of Appeals on or about December 24, 1936, with leave to complainants to serve an amended bill of complaint. Pursuant to such mandate, and pursuant to order made by Honorable Robert P. Patterson, dated February 19, 1937, the amended bill of complaint herein was filed on or about April 17, 1937. The defendants Charles Armbrecht, Maude D. DuMont and Nehemiah Freedman could not be served in said action.

TWELFTH: Complainants did not learn until September 29, 1942, that the stock which was registered in the name of Charles Armbrecht was beneficially owned by Jules S. Bache and had no way of knowing that Jules Bache was the real and beneficial owner of the stock registered in the name of Charles Armbrecht.

THIRTEENTH: At the time of the institution of the proceedings in Minnesota, and the proceedings for the appointment of an ancillary receiver in the Southern District

of New York, it was doubtful, under the statute and under reported decisions, and complainants were advised by counsel that it was doubtful, whether an original representative action in equity could be maintained by complainants or other creditors except in the District of Minnesota terminating in the appointment of an equity receiver to whom the collection of claims against all stockholders would be entrusted. Reported and other decisions including the decree in such Minnesota action, and in ancillary proceedings in the Districts of Ohio, Massachusetts and Connecticut, and in Special Term of the Supreme Court of the State of New York, New York County, and in the District Court of the Southern District of New York, were authorities that a representative action in equity might not be maintained by creditors of a Joint Stock Land Bank. Until the reversal of the decree appointing an ancillary receiver on behalf of complainants, there were no reported decisions casting doubt on the propriety of proceedings instituted in this District by complainants. Complainants and their attorneys relied on such decision and authorities in pursuing the remedies which appeared open to them against the defendants, and proceeded with all due diligence to enforce them, and complainants have been constantly, since July 28, 1932, maintaining legal proceedings directed to the enforcement of their remedies against defendants.

FOURTEENTH: The action instituted in the United States District Court for the Southern District of New York came on for trial before Honorable John M. Woolsey on or about the 23rd day of May, 1938, and a decree was entered in said suit on or about January 30, 1939, adjudging that the Southern Minnesota Joint Stock Land Bank of Minneapolis was insolvent and that it was necessary to assess all stockholders to the extent of One Hundred Per Cent (100%) of the stock held by each stockholder.

FIFTEENTH: Thereafter and on or about May 2, 1942, complainants instituted an action against the defendants Charles Armbrecht, Maude D. DuMont and Nehemiah Freedman who could not be served in the action originally instituted in the Southern District, referred to in the foregoing paragraph, and joined as party defendants the partners doing business under the firm name and style of J. S. Bache & Company and in the course of said action learned that the name of Charles Armbrecht was used as a "dummy" or nominal party for the real and beneficial owner Jules S. Bache.

SIXTEENTH: Thereafter and by notice of motion dated March 24, 1943, the defendant Charles Armbrecht appeared specially to quash service of the summons and complaint on the ground that said defendant was not properly served with process in this action, and on October 28, 1943, by order of United States District Judge Murray Hulbert the motion to quash service of the summons and complaint as against the defendant Charles Armbrecht was granted. The complainants have thus continuously and diligently attempted by the aforesaid legal proceedings to enforce their remedies against the defendants.

SEVENTEENTH: The defendants are individually responsible equally and ratably and not one for another for all contracts, dates and engagements of said Southern Minnesota Joint Stock Land Bank of Minneapolis to the extent of the amount of stock owned by them at the par value thereof in addition to the amount paid in as represented by their shares.

EIGHTEENTH: Complainants herein bring this suit on behalf of all creditors of said Southern Minnesota Joint Stock Land Bank of Minneapolis, which creditors include bondholders of said Bank and all others who have general

claims against said Bank. The amount recovered by complainants herein will be for the benefit of the complainants and all other creditors of said Bank who may file and prove their claims against said Bank. It is necessary that an accounting be had among the creditors of said Bank in order to determine how much of the amount recovered shall be awarded to the complainants and to each of the other creditors. An accounting of the assets and liabilities of said Southern Minnesota Joint Stock Land Bank of Minneapolis may be necessary in order to determine the deficiency of assets and the statutory liability of its said stockholders. For these reasons, these complainants and all others in whose behalf this Bill is brought have no adequate remedy at law, and unless this Court shall take jurisdiction of this cause and exercise its equitable jurisdiction herein, these complainants and all others on whose behalf this Bill is brought will suffer great and irreparable damage, and this suit cannot be maintained against the defendants herein.

For as much, therefore, as complainants are without remedy in the premises, except in a court of equity where matters of this nature are exclusively cognizable, and to the end that they may obtain from this Honorable Court the relief to which they are by right and equity entitled, they respectfully pray:

(a) That the above defendants and each of them be directed, full and true and perfect answer to make to this Bill of Complaint;

(b) That a summons issue herein, directed to the above named defendants and each of them;

(c) That the present suit be treated and regarded in all respects as a class suit in equity wherein and whereby these complainants sue as the representatives of all creditors of said Southern Minnesota Joint Stock

Land Bank of Minneapolis for the purpose of enforcing the double liability of the defendant stockholders of the said Southern Minnesota Joint Stock Land Bank of Minneapolis, to the end that there may be provided a fund to be administered by this Honorable Court for the equal benefit of all of the creditors of the said Southern Minnesota Joint Stock Land Bank of Minneapolis, and that this Honorable Court if it deem it necessary, decree and order an accounting for the purpose of fixing and determining the amount of the assessment to be levied aganist the defendants herein;

(d) That the defendants herein and all who may be defendants hereto, be decreed and ordered to pay the amount of their respective assessments;

(e) That the sums thus realized and collected from the defendants herein be administered by this Honorable Court, as a court of equity, and be distributed ratably and equitably among the creditors of the said Southern Minnesota Joint Stock Land Bank of Minneapolis in such manner as this Honorable Court may direct and that this Honorable Court order the decree an accounting among the creditors of the said Southern Minnesota Joint Stock Land Bank of Minneapolis for the aforesaid purpose.

The Complainants pray for such other and different relief as may appear to this Honorable Court to be just and equitable in the premises.

FRANKLIN S. WOOD,
Attorney for Complainants
Office & P. O. Address
20 Exchange Place
Borough of Manhattan,
New York, N. Y.

Answer.

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

GEORGE C. HOLMBERG, FRANK C. BALL, CARL J. EASTERBERG, GEORGE F. HARDIE and PAT B. MORRIS on behalf of themselves and all other creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis, Complainants, against JULES S. BACHE and CHARLES ARMBRECHT, Defendants.	Civil Action, File No. 23-247

The defendants Jules S. Bache and Charles Armbrecht by Cook, Lehman, Greenman, Goldmark & Loeb, their attorneys, for their answer to the complaint herein, allege:

1. As to each and every allegation contained in paragraphs "First", "Second", "Third", "Fourth", "Fifth", "Sixth", "Seventh", "Eighth" and "Eighteenth" of the complaint, deny that they have any knowledge or information thereof sufficient to form a belief.

2. Deny each and every allegation contained in paragraph "Tenth" of the complaint, except defendants admit that on May 2, 1932 defendant Jules S. Bache was the owner of 100 shares of stock of the Southern Minnesota Joint Stock Lank Bank of Minneapolis and that the certificate for such shares was and had been at the time long prior thereto when it was acquired by said defendant registered on the books of said corporation in the name of Charles Armbrecht.

3. As to each and every allegation contained in paragraph "Eleventh" of the complaint, deny that they have any knowledge or information thereof sufficient to form a belief, except defendants deny that the defendant Charles Armbrecht could not have been served in the action therein referred to.

4. As to each and every allegation contained in paragraph "Thirteenth" of the complaint, deny that they have any knowledge or information thereof sufficient to form a belief, except defendants deny that the complainants and their attorneys have proceeded with all due diligence to enforce their remedies and that they have constantly since July 28, 1932 maintained legal proceedings directed to the enforcement of their remedies against these defendants.

5. Deny each and every allegation contained in paragraphs "Twelfth" and "Seventeenth" of the complaint.

6. Deny each and every allegation contained in paragraph "Fifteenth" of the complaint, except defendants admit that an action was instituted on or about May 2, 1942 by complainants herein in the United States District Court for the Southern District of New York in which defendant herein Charles Armbrecht and Maude D. DuMont and Nehemiah Friedman and certain individuals, including defendant herein Jules S. Bache, doing business under the firm name and style of J. S. Bache & Co. were named as parties defendant.

7. Deny each and every allegation contained in paragraph "Sixteenth" of the complaint, except defendants admit that defendant Charles Armbrecht appeared specially in the action mentioned in the foregoing paragraph of this answer and by notice of motion, dated March 24, 1943, moved to quash the alleged service of the summons and com-

plaint upon him on the ground that he was not properly served with process, which motion was duly granted by United States District Judge Murray Hulbert who signed an order accordingly on October 28, 1943.

FIRST DEFENSE:

8. The time within which plaintiffs were entitled to institute the action set forth in the complaint herein expired before the commencement of this action and complainants' right to bring the action is barred by the statute of limitations in such case made and provided by the statutes of the State of New York.

SECOND DEFENSE:

9. Complainants have been guilty of laches in that they have unduly delayed the commencement of the action herein.

WHEREFORE, defendants demand judgment that the complaint herein be dismissed and that they have their costs and disbursements of this action.

COOK, LEHMAN, GREENMAN, GOLDMARK & LOEB,
Attorneys for Defendants,
By EDGAR M. SOUZA, of Counsel,
Office & P. O. Address,
No. 20 Pine Street,
Borough of Manhattan,
New York City 5, N. Y.

Testimony

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

GEORGE C. HOLMBERG, et al., Plaintiffs, vs. MAUDE D. DUMONT, et al., Defendants.	Civ. 18-110
GEORGE C. HOLMBERG, et al., Plaintiffs, vs. CHARLES ARMBRECHT, et al., Defendants.	Civ. 23-247

Before: HON. JOHN W. CLANCY, *District Judge.*

New York, October 10, 1944,
10.30 o'clock A. M.

APPEARANCES:

FRANKLIN S. WOOD, Esq., attorney for Plaintiffs; CLARENCE FRIED, Esq., of counsel.

COOK, LEHMAN, GREENMAN, GOLDMARK & LOEB, Esqrs., attorneys for defendants; EDGAR M. SOUZA, Esq., of counsel.

(Mr. Fried made an opening statement on behalf of the plaintiffs.)

(Mr. Souza made an opening statement on behalf of the defendants.)

The Court: We will adjourn to Monday morning at half-past ten.

(Adjourned to Monday, October 16, 1944, at 10.30 A. M.)

New York, October 16, 1944, 10.30 A. M.

(Met pursuant to adjournment.)

(Appearances as before.)

Mr. Fried: Your Honor, there are a number of stipulations and concessions between counsel. I mentioned a number of them in the opening statement. I do not know whether your Honor desires, but it might be well, if your Honor sees fit, to have me state them at this time so that we have all the stipulations and concessions for the record at this point.

As to the title of the action, it is stipulated with regard to the second consolidated action that in the place of Jules S. Bache, as an individual, there be substituted in his place and stead the names of Gilbert Miller, Barbara Richards Michel, Muriel Richards Pershing and Dorothy Richards Hirshon, as executors under the last will and testament of Jules S. Bache, deceased.

It is also stipulated that the complaint be amended to include appropriate allegations alleging that the original defendant, Jules S. Bache, died on March 24, 1944, and that letters testamentary were duly issued by the Surrogate of New York County to the aforementioned executors on March 30, 1944, and that the complainants were not required to serve and file an amended complaint.

It was further stipulated that the pleadings of the original parties remain as the pleadings of the substituted parties.

It has also been stipulated in relation to the assets and liabilities of the Southern Minnesota Joint Stock Land Bank of Minneapolis, that the liabilities of that bank exceeded its assets by $3,000,000, the amount of its total outstanding capital stock, and that there is need for an assessment to the extent of 100 percent of the stock owned by the shareholders of the Southern Minnesota Joint Stock Land Bank of Minneapolis.

It is further conceded in the pleadings that Mr. Jules S. Bache individually was the owner of the 100 shares of stock registered in the name of Charles Armbrecht as of May 2, 1932, the date when the bank closed.

It is also conceded by the attorneys for the defendants that the complainants in this case are trustees with upwards of $13,000,000 worth of bonds of the bank, and that the complainant Frank C. Ball is the owner of $4,000 face amount of bonds of said bank.

Mr. Souza: May I state for the record that I do not concede that in the sense that that is the fact. I concede if witnesses were called from Minnesota they would so testify.

Mr. Fried: I am sorry. I should have said that. I believe to the same effect it is also conceded that if a witness were called on behalf of the complainant he would testify that the records of the bank indicate that Charles Armbrecht was the owner of 100 shares of stock of the bank on May 2, 1932.

The Court: What is the difference between that and the beneficial owner?

Mr. Fried: I said Mr. Bache admitted he was the beneficial owner of the stock and now I am saying if a witness were called he would testify that according to the records of the bank there would be an indication that Charles Armbrecht was the owner of record of 100 shares of stock of that bank.

On this latter score I offer in evidence the stub certificate of the bank indicating that certificate 7079 was issued to Charles Armbrecht, care of J. S. Bache & Co., 42 Broadway, New York, on January 20, 1928, and there is a receipt dated January 23, 1928, with a rubber stamp, "J. S. Bache & Co., 42 Broadway."

(Marked Plaintiffs' Exhibit 1.)

Mr. Souza: In that connection, if your Honor please, in view of the fact that these are photostatic copies of the records, and I have stipulated that if a witness were here he would testify to that fact, I also want to have it understood that I shall be free, if I find it necessary, to offer in evidence, upon the same understanding if a witness were here he would so testify, that certain stock certificates which were originally in the name of J. S. Bache & Co. were transferred to Armbrecht's name, making up these 100 shares, in January of 1928. In other words, Mr. Fried sent me over, the other day, I think it was Friday afternoon, copies of some earlier stock certificates which were used as a basis for this transfer of the 100 shares in the name of Charles Armbrecht, and it may be it will be necessary during the trial to use this as evidence, and I want the same understanding, that I can use them the same as he is using these photostatic copies; in other words, I do not want to be met by the objection that they are photostatic copies.

Mr. Fried: No. I also offer at this time photostatic copy of certificate No. 7080, from the stub book of the bank, indicating that 50 shares of stock had been issued to Charles Armbrecht, c/o J. S. Bache & Co., 42 Broadway, New York City, on January 19, 1928, and dated January 23, 1928, with a rubber stamp of J. S. Bache & Co., 42 Broadway, New York City,

(Marked Plaintiffs' Exhibit 2.)

Mr. Fried: On the same assumption, that if a witness were called he would testify, I offer in evidence a photostatic copy of the ledger of the bank——

The Court: What is the difference between stating if a witness were called he would testify to some records, or he would testify to a fact? Has the Judge any province to refuse to accept the evidence?

Mr. Souza: No. I should say, your Honor, that you would accept that as the evidence in the case. Because I am not going to attempt to contradict this. It might be different if I were attempting to contradict it, but I am not.

(Marked Plaintiffs' Exhibit 3.)

Mr. Fried: Your Honor, I have here the examination of the defendant Morton F. Stern, and I could offer that in evidence rather than read it, if your Honor wishes me to do that. It is not very long. And we can offer that in question and answer form if it is so desired.

The Court: I will take it. Maybe you had better read it.

Mr. Souza: As I understand the rule, does not counsel have to show that the individual is not within 100 miles of the court in order to read a deposition in, or that there is some other reason why he is not available?

The Court: How was the deposition taken?

Mr. Fried: It was taken of the defendant in this action as an adverse party. As I understand the rule, when it is taken of a party, there is no necessity of any showing. I might add for the record that we have been endeavoring to subpoena Mr. Stern since Friday night and he has been evading service.

The Court: I think the deposition, according to the rule, the witness being a party, is admissible.

Mr. Souza: As a matter of fact, Mr. Stern is going to be here some time this morning.

Mr. Fried: I have had my process server trying to locate him since Friday.

Mr. Souza: I did not know that. I know that he was at his office all Saturday morning because I was talking to him.

The Court: Is it a question and answer deposition?

Mr. Fried: Yes. Mr. Souza was present at the time.

The Court: I will allow you to read it.

Mr. Souza: I respectfully except.

(Mr. Fried then read the deposition of MORTON F. STERN as follows:)

"Q. Are you a member of the firm of J. S. Bache & Co.? A. Yes, sir.

"Q. And that is a partnership? A. That is right.

"Q. When did you become a partner of J. S. Bache & Co.? A. 1920, I believe.

"Q. Do you know who the partners were on May 2, 1932? A. I think I can recall them for you.

"Q. Will you state their names please? A. Jules S. Bache, Nathan Kann, Frank J. Murphy, Morton F. Stern, Fred L. Richards, Arthur F. Broderick, Joseph P. Griffin, Hugo J. Lion, Harold L. Bache, Walter F. Schultze and Seymour M. Ottenberg. I think that's all. I don't think I left anyone out. Mr. Kann was a limited partner.

"Q. Are you certain about this? A. Reasonably sure.

"Q. In the event you find need for any correction, will you make it? A. Yes, sir.

"Q. Do you know the defendant Charles Armbrecht? A. Yes, I do.

"Q. Was he formerly connected with J. S. Bache & Co.? A. He was.

"Q. In what capacity? A. Connected with the cage—cashier's department.

"Q. Was he an employee? A. He was.

"Q. He was not a partner? A. No, sir.

"Q. Was he employed by J. S. Bache & Co. in 1932? A. He was.

"Q. And prior thereto? A. Yes, sir.

"Q. Are you familiar with the fact that certain shares of stock in the Southern Minnesota Joint Stock Land Bank of Minneapolis were registered in the name of Charles Armbrecht? A. I vertified that recently.

"Q. It is a fact, is it not, that 100 shares of the capital stock of the Southern Minnesota Joint Stock Land Bank of Minneapolis were registered in the name of Charles Armbrecht? A. I haven't seen the certificate.

"Q. You say you vertified that recently—what did you consult? A. One of my employees told me that 100 shares had been registered in Armbrecht's name.

"Q. Do you know whether these 100 shares were purchased for a customer of J. S. Bache & Co.? A. Being unable to get the ledgers showing the actual date of purchase I cannot make an affirmative statement, but our records show that we were holding 100 shares of this stock for a customer in 1932.

"Q. Do you know the name of the customer? A. The customer that was long of it in 1932 was Jules S. Bache."

Mr. Souza: I object to the balance of the answer, if your Honor please, as incompetent, irrelevant and immaterial. The balance is "It is possible that at a previous date it may have been either held or purchased for one of his various holding companies."

The Court: I will strike out the part "It is possible," and sustain the objection to it.

Mr. Fried: The first sentence is proper?

The Court: That is right.

Mr. Fried: While I think it is immaterial, the fact remains that I do not think Mr. Souza is in position to strike out an answer of his witness. If it is not responsive I understand the rule to be the attorney who asked the question has the privilege of either making that motion or accepting the answer.

The Court: I would not agree with that at all. I think when these depositions are produced on the trial they are subject to objection from any counsel.

Mr. Fried: I won't argue the point.

Mr. Souza: The rule so states.

"It is possible that at a previous date it may have been either held or purchased for one of his various holding companies.

"Q. Who was it that issued instructions that the stock be purchased in Mr. Armbrecht's name? A. That I would be unable to answer.

"Q. Do you know how the stock was paid for? A. No, I have no records to show that and no memory of it.

"Q. Do you know from whom it was purchased? A. Same answer—no records and no memory.

"Q. It is a fact, is it not, Mr. Stern, that Mr. Armbrecht's name was merely used as a nominal party? A. That I could not answer.

"Q. Do you know whether Mr. Armbrecht purchased this for his own use? A. I presume not, but as there are no records my statements must be taken as an opinion and not as fact.

"Q. Was it the practice of J. S. Bache & Co. to purchase bank stocks in the name of nominal parties? A. We never purchased any securities in names other than the actual purchaser.

"Q. Is Charles Armbrecht presently employed by J. S. Bache & Co.? A. We have been pensioning him for the last four years or five years. He is a very old gentleman and very sickly.

"Q. Do you have any records which show the nature of this transaction. I mean with respect to the purchase of 100 shares in the name of Charles Armbrecht? A. Our records do not run back that far, as it is our practice and

has been for the last seven or eight years to only keep ten year records.

"Q. You stated before that you verified that 100 shares stood in the name of Charles Armbrecht, now I ask you what records did you consult in obtaining that information? A. I obtained that information from one of my employees by the name of Graham and I did not consult any records.

"Q. Do you know whether he consulted any records of J. S. Bache & Co.? A. I did not ask him and I have no knowledge as to whether he consulted records or not.

"Q. Do you know of any records that you could consult to verify this information that you obtained from Mr. Graham? A. A very simple way would be to get the actual certificate out and look at it if it is still held by us for one of our clients.

Q. Did you search your records to ascertain if that certificate is in your possession? A. No, sir.

"By Mr. Souza: It has not been in the possession of J. S. Bache & Co. since 1933.

"Q. Do your records indicate what happened to that certificate? A. Our stock record indicates that on January 6, 1933, the certificate was delivered out of our possession.

"Q. To whom? A. To Mr. Jules S. Bache or one of his nominees.

"Q. Can I have that marked for identification?

"By Mr. Souza: What?

"Q. That record he is looking at?

"By Mr. Souza: Yes.

"(The witness produced and examined a photostatic copy of the stock record showing entries under the

heading 'Southern Minnesota Joint Stock Land Bank of Minneapolis October, 1931 to January 6, 1933.' Marked Complainants' Exhibit 1 for Identification.)

"Q. May we have a copy of that?

"By Mr. Souza: Yes, I will have a copy made for you.

"Q. Is Mr. Bache at the present time a member of the partnership of J. S. Bache & Co.? A. He is."

Mr. Fried: At this time I offer in evidence the photostatic copy which was marked Complainant's Exhibit 1 in the examination of Morton F. Stern. It is a photostatic copy of a ledger sheet of J. S. Bache & Company entitled "Southern Minnesota Joint Stock Land Bank of Minneapolis", and it indicates that Mr. J. S. Bache was long 100 shares of that stock starting with October, 1931.

(Marked Plaintiffs' Exhibit 4.)

Mr. Fried: Now, if your Honor please, I should like to read from the examination before trial of Mr. Charles Armbrecht, taken at the office of Cook, Lehman, Greenman, Goldmark & Loeb, and verified on May 12, 1944.

Mr. Souza: If your Honor please, I press my objection to this deposition at this time under Rule 26, "Deposition Pending Action", and I call your Honor's attention to subdivision (3) of subsection (d), which reads as follows:

"Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party

who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

"(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

"(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, that the witness is dead; or 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or, 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or, 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or, 5, upon application and notice that such exceptional circumstances exist as to make it desirable, in the interest of justice, and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used."

Mr. Fried: Well, I did not think there would be any objection to Mr. Armbrecht's testimony. Mr. Armbrecht is some 79 years old.

Mr. Souza: He is 87 or 88 or 89, he claims.

Mr. Fried: To bring him down would be a hardship, but he is Mr. Souza's client and if he insists upon it I will have him subpoenaed and brought down here.

The Court: After reading this rule I should say the objection is valid.

Mr. Fried: I may be impressed by the State court rule, but frankly if Mr. Souza reads from the rule I assume he is reading correctly, and I cannot disagree if that is what the rule says.

The Court: Maybe his objection to Mr. Stern's deposition is well taken, too.

Mr. Fried: Mr. Stern is here now.

The Court: That does not relieve my record of error if I have made one.

Mr. Fried: That is correct. I can call Mr. Stern as my witness unless Mr. Souza will concede that the reading of the deposition in the record is at this time satisfactory and that objection is waived.

Mr. Souza: I will waive the objections to the Stern examination, if your Honor please.

The Court: I will sustain your objection to this one.

Mr. Fried: Your Honor, I have prepared a statement, and I have furnished a copy to my adversary, or what I would testify if I am called as a witness. I am prepared to take the oath and be cross-examined regarding the statements I make in this prepared form. If there is no objection I should like to offer that statement in evidence.

Mr. Souza: I am sorry, if your Honor please, but I will have to object to the statement in this form. It is not in such form that it can go in the record in this way, and if Mr. Fried wants to testify to it, he will just have to do it.

Mr. Fried: May I first call this witness, Mr. Armbrecht's son?

CHARLES ARMBRECHT, JR., called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. Fried.

Q. Mr. Armbrecht, are you the son of Charles Armbrecht? A. Yes, sir.

Q. He was formerly employed by J. S. Bache & Co.? A. Yes, sir.

Q. Where does he reside now? A. 2643 Davidson Avenue, Bronx.

Q. How old is your father now? A. He was eighty-nine on August 30th of this year.

Q. Is your father able to come to court? A. Oh, the last year his legs have been very bad and he very seldom goes out.

Q. Is he able to walk now? A. Yes, he walks a block or two; sometimes a little more than that.

Q. Is he able to come down to court, as far downtown as this? A. Yes, if he does not have to walk far. He goes downtown once in a while.

Q. How much of a walk does he have to the subway? A. About two blocks.

Mr. Fried: That is all.

Cross-examination by Mr. Souza.

Q. Do you know that he was downtown quite recently at the office of J. S. Bache & Company, to get his pension check? A. He goes down about every two weeks; sometimes maybe only once a month, but that is only a short distance to go from his house to the subway; it is one block, and then it is two doors to the office of J. S. Bache & Company.

Q. You do not know of any reason why he could not come down here today if he were subpoenaed, do you? A. No, I do not think so.

Mr. Souza: That is all.

The Court: Do you really object to that deposition now? I think on the testimony that going down to cash a check once in a while and coming to court are very different things. He would have to climb the front steps of this courthouse if nothing else. I think they are two different situations. I think it is very doubtful whether he really is able to come to this court.

Mr. Souza: If your Honor feels that way about it I certainly have no objection to your Honor ruling that way.

The Court: Is there any substantial point depending on his testimony?

Mr. Souza: I don't think so, really. I don't think there really is.

The Court: Very good. We will take his deposition and let him stay home.

(Deposition of CHARLES ARMBRECHT, SR., read by Mr. Fried:)

"*Direct examination by Mr. Fried.*

"Q. What is your full name? A. My full name is Ernest Charles Louis, but I always give my name out as Charles; that is what I have been called since I came to the firm.

"Q. What is your last name? A. Armbrecht.

"Q. Where do you live, Mr. Armbrecht? A. 2643 Davidson Avenue. I am boarding, that is to say I live there.

"Q. Are you the Charles Armbrecht named as a defendant in this action? A. I can't get that.

"Q. Withdrawn. Did you ever hear of the Southern Minnesota Joint Stock Land Bank of Minneapolis? A. I don't remember it.

"Q. Did you ever buy any stock in the Southern Minnesota Joint Stock Land Bank of Minneapolis? A. I never bought any of that stock.

"Q. Did you ever pay for any stock of the Southern Minnesota Joint Stock Land Bank of Minneapolis? A. How can I when I didn't buy it?

"Q. Did you ever sign any checks in payment for that stock? A. No, I have no right to sign any checks at all.

"Q. Did you have any conversation with Mr. Jules S. Bache about stock in the Southern Minnesota Joint Stock Land Bank of Minneapolis?"

Mr. Souza: I object to that, if your Honor please, whether he had any conversation with him or not.

The Court: Why?

Mr. Souza: Mr. Bache is dead.

The Court: Is Mr. Armbrecht making any claim through him? I do not think that is an objection. I will overrule it.

Mr. Souza: Exception.

Mr. Fried (continuing reading):

"A. He never told me anything about any stocks at all.

"Q. Did Mr. Bache ever tell you that he bought stock of the Southern Minnesota Joint Stock Land Bank of Minneapolis in your name?"

Mr. Souza: I object to that, if your Honor please.

The Court: The same ruling.

Mr. Souza: Let me call your Honor's attention to the fact that here we have a question as to whether Mr. Bache's estate is liable in connection with this stock and possibly as between Mr. Armbrecht and Mr. Bache.

The Court: I will overrule the objection. It is under Section 347?

Mr. Souza: Yes.

The Court: I will overrule it.

Mr. Souza: Exception.

(Mr. Fried continued reading as follows:)

"A. He never told me anything. Very seldom I seen him at the office."

"Q. Did you ever know that stock of the Southern Minnesota Joint Stock Land Bank of Minneapolis was put in your name? A. I don't know nothing about it.

"Q. Did anyone else in the firm of J. S. Bache & Co. tell you about the stock being registered in your name? A. No, nobody ever told me anything about it.

"Q. When, for the first time, did you learn that there was a claim by the complainants in this action that there were shares of stock of the Southern Minnesota Joint Stock Land Bank of Minneapolis registered in your name? A. Only here lately that I heard about it.

"Q. You never knew about that before? A. I don't remember.

"Q. Did you ever spend any money of your own to buy any stock in the Southern Minnesota Joint Stock Land Bank of Minneapolis? A. No. I was afraid of that because I didn't have enough money to buy any.

"Q. Did you ever have $10,000 to buy shares of stock in the Southern Minnesota Joint Stock Land Bank of Minneapolis? A. No. If I had $10,000 I would think I was a millionaire."

Mr. Souza: I move to strike out all after "No".

The Court: Strike it out.

CLARENCE FRIED, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

(147-22 73rd Avenue, Kew Gardens Hills, Long Island.)

The Witness: Does your Honor desire this in question and answer form or narrative?

The Court: I think it ought to be put in question and answer form.

Direct examination by Mr. Fried.

Q. Are you an attorney at law, admitted to practice in the State of New York? A. I am.

Q. Are you also duly admitted to practice law in the Southern and Eastern Districts of New York and the Circuit Court of Appeals for the Second Circuit? A. I am.

Q. Are you associated with Franklin S. Wood, attorney for the complainants? A. I am.

Q. When did you become associated with Mr. Wood? A. In the latter part of March, 1936.

Q. Since that date to the present time have you been in charge of the litigation on behalf of the complainants, of the creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis? A. I have been.

Q. At the time you became associated with Mr. Wood what was the status of the proceeding by the complainants? A. When I became associated with Mr. Wood there was a proceeding pending in the United States District Court for the Southern District of New York, entitled George C. Holmberg, et al., against Frederick S. Carr, et al., Inc., E-81-369.

Q. What was the nature of that action?

Mr. Souza: Now, I object to it as immaterial.

The Court: I will allow it.

Mr. Souza: Exception.

A. The complainants in that case were identical with the complainants in this action. Besides the named defendant Frederick S. Carr, the bank and its receiver, Irving J. Friede, there were two other resident stockholders named as parties defendant, namely, Ralph Behrisch and Caroline T. Behrisch. The action was one for the appointment of an ancillary receiver. The complaint briefly alleged that the Southern Minnesota Bank closed its doors on May 2nd, 1932; that the Federal Farm Loan Board on that day appointed a receiver because of the declaration by that board of the insolvency of the bank, and that on July 28, 1932, the complainants, who were the same complainants as in suit and in the previous suit, instituted an action as creditors of the bank in the United States District Court, District of Minnesota, Fourth Division, against all stockholders of the bank for the purpose of enforcing the stockholders' liability created and provided for by an Act of Congress known as the Federal Farm Loan Act, U. S. C. A., Title 12, Chapter 7, Section 812.

Mr. Souza: If your Honor please, may I have it noted on the record at this point that no member of the firm of J. S. Bache & Company nor the firm of J. S. Bache & Company nor Mr. Jules S. Bache were parties defendant in that suit.

Mr. Fried: I am willing to concede that, your Honor.

The Court: All right.

A. (Continuing) In the bill there were named as defendants that bank and all stockholders of the bank who appeared as owners of record on May 2nd, 1932. Some

of the stockholders resided in Minnesota and many others resided outside of the State. Service was effected upon the stockholders who were residents of the State of Minnesota and those who could be found in that State, and service upon non-resident stockholders was had by publication by order of the Court and by mail addressed to the stockholders at their addresses appearing on the stock books of the bank in accordance with the order of the Court.

The Court: Is this all in the complaint?

The Witness: This is all in the complaint.

A. (Continuing) The Minnesota court, after extensive trials and hearings, found that the bank was insolvent and that its liability exceeded its assets to the extent of $4,264,687.59, and that an assessment of 100 percent against all stockholders was necessary.

The total outstanding stock of the bank was in the face amount of $3,000,000. The decree embodying the foregoing was entered in the United States District Court, District of Minnesota, Fourth Division, on April 20, 1935. An exemplified copy of that decree was annexed to the bill of complaint instituted here in the case of Holmberg v. Carr, and in that action the bill of complaint prayed for the appointment of Irving J. Friede as ancillary receiver to enforce the decree of the Minnesota court against stockholders of the bank resident in New York. Irving J. Friede was also appointed as receiver by the Minnesota court for the enforcement of the collection of the statutory liabilities against the stockholders. He also acted in the secondary capacity as statutory receiver of the bank. I should say in a dual capacity rather than secondary capacity.

Q. What happened to the case of Holmberg v. Carr? A. A motion was made by the defendant, Frederick S. Carr,

to dismiss the bill of complaint and was denied by United States District Judge Robert P. Patterson, on March 9, 1936.

Mr. Souza: If your Honor please, may it be understood that I have an objection to this line of testimony as immaterial.

The Court: Overruled.

Mr. Souza: Exception.

A. (Continuing) The defendant then interposed his answer to the bill of complaint and the complainants moved to strike out the answer and for the appointment of the ancillary receiver, and by order of this Court, dated April 23, 1936, Irving J. Friede was appointed ancillary receiver. An appeal was taken from that order by the defendant Frederick S. Carr, and on appeal the Circuit Court for the Second Circuit on or about December 24, 1936, reversed the order of Honorable Robert P. Patterson and the case is cited in Holmberg v. Carr, 86 Fed. (2d) 727.

The Circuit Court in effect held that the Minnesota decree had no extraterritorial effect and that the statutory liability imposed by Section 812 of the Banking Law could only be enforced in this State by an original action in equity, and in that order the Circuit Court gave the complainant leave to serve an amended complaint.

Q. In the interim between the appointment of Irving J. Friede as ancillary receiver and the reversal by the Circuit Court of Appeals, what took place? A. After the appointment of Irving J. Friede as ancillary receiver by order of this Court dated April 23, 1936, I prepared summonses and complaints against the individual defendants in separate actions at law in the name of the receiver. These separate actions at law were instituted in the State courts and in the Federal court. One of such actions was instituted against the defendant Charles Armbrecht in the

name of Irving J. Friede as ancillary receiver appointed by order of Judge Patterson dated April 23, 1936, against Charles Armbrecht, Index No. L-65-73.

Q. What happened to that action? A. The records of the court indicate that the complaint was served upon Charles Armbrecht by one Harry Miller on August 13, 1936, at 2565 Marion Avenue, Borough of the Bronx, City of New York.

Q. Did Mr. Armbrecht interpose any answer in that action? A. No answer was ever interposed by the defendant.

Q. What ultimately happened to that case? A. On October 27, 1936, I prepared a form of judgment and had Mr. Wood sign it, and when I came to enter that judgment I was advised that I would have to proceed on the theory of a decree pro confesso, and it might be necessary to prove the allegations of the complaint. I then decided to wait until we were in a position to enter judgment against other defendants who had defaulted. However, when the Circuit Court reversed the order of Judge Patterson it was no longer possible to enter a judgment in that action in the name of Irving J. Friede because his appointment as ancillary receiver had been nullified by decision of the Circuit Court.

Mr. Souza: On what date?

The Witness: I have already indicated the Circuit Court rendered its decision on December 24, 1936.

Q. What then happened in the case of Holmberg v. Carr? A. As a result of the ruling of the Circuit Court, all State court actions previously instituted in the name of the receiver were discontinued and an application was made before Judge Patterson for leave to serve an amended complaint. This was in accordance with the mandate of the Circuit Court which gave the complainants

leave to serve an amended complaint, and on February 19, 1937, Judge Patterson made his order on the mandate permitting the complainants to amend the bill of complaint and it was thereafter filed on or about April 17, 1937.

In that action approximately 176 defendants were named and the defendant Charles Armbrecht was also named as a party defendant.

Mr. Fried: At this time I offer in evidence a printed copy of the complaint which is identical to the complaint on file in the case of Holmberg v. Anchell, et al., which is the amended complaint in accordance with the order and mandate entered by Judge Patterson.

Mr. Souza: I object to it as irrelevant and immaterial.

The Court: Overruled.

Mr. Souza: Exception.

(Marked Plaintiffs' Exhibit 5.)

The Witness (continuing): Annexed to the bill of complaint as Schedule A are the list of stockholders as they appeared upon the records of the bank and the addresses, and the defendant Charles Armbrecht was listed "Care J. S. Bache & Co., 100 shares, par value $10,000."

Q. Did you issue summonses and complaints for service? A. I did.

Q. Was service made upon Charles Armbrecht? A. I delivered a batch of printed complaints to the sheriff and advised him to make service upon the defendants, and on May 18, 1937, returns were made by the marshal and he returned a number of complaints because he could not make service and enclosed a check——

Mr. Souza: Now, if your Honor please, I move to strike out the statement "because he could not make service."

The Court: How about it?

Mr. Fried: I offer it in evidence at this time. Let me first testify to lay the foundation for it.

Q. Did you receive returns from the marshal? A. The complaints were returned, and the check in the sum of $103.40 was received by me from the marshal annexed to his letter dated May 18, 1937.

Mr. Souza: I object to that, if your Honor please, as incompetent, irrelevant and immaterial, and move to strike it out.

The Court: I will deny your motion and overrule your objection.

Mr. Souza: Exception.

(Marked Plaintiffs' Exhibit 6.)

Mr. Souza: I make the further objection, if your Honor please, that Plaintiffs' Exhibit 6, dated May 18, 1937, does not indicate what the $103.40 covered, or otherwise.

The Court: What have you to say?

Mr. Fried: I say I delivered a batch of complaints to the marshal and a check, and instructed him to serve all the defendants named on that exhibit. He subsequently returned the printed complaints and said he could find only those on whom he made return, and the others he could not find and he sent that back as a refund.

The Court: I will overrule the objection.

Mr. Souza: Exception.

Q. Did you make further attempts to locate Mr. Armbrecht? A. Yes. I personally made inquiries at 2565 Marion Avenue.

Mr. Souza: May I have the date of that fixed, if your Honor please.

The Witness: To the best of my recollection it was July or August of 1938. I went to the premises at 2565 Marion Avenue and made inquiries but could not find any forwarding address or any place that Mr. Armbrecht had moved to, nor did the superintendent know Mr. Armbrecht.

Mr. Souza: I object to that, if your Honor please, as incompetent, irrelevant and immaterial, and not the proper testimony as to what the superintendent knew.

The Court: Overruled.

Mr. Souza: Exception.

Q. What then happened to the case of Holmberg v. Anchell? A. The case proceeded to trial before Honorable John M. Woolsey, and started on the 23rd day of May, 1938, and ended in June of 1938. Judgment was entered in that case on January 23, 1939. Several of the defendants——

Mr. Souza: May we have the date of the decision, if your Honor please. It was on August 20, 1938.

The Witness: It was in the summer of 1938.

Mr. Souza: I have August 20, 1938.

Mr. Fried: I will accept that as correct. That is correct, yes.

The Court: A judgment entered a whole year after?

Mr. Fried: No, it was less than six months after. January 23, 1939.

The Witness (continuing): We had considerable difficulty recording the findings of fact nd conclusions of law, and there was a hearing regarding the findings and conclusions after Judge Woolsey came back from his summer vacation. I do not recall the date of that. And after we

had worked on that for a considerable length of time judgment was finally entered on January 23, 1939.

Some of the parties then took an appeal to the United States Circuit Court of Appeals for the Second Circuit, and on April 23rd the judgment was affirmed. The opinion is reported in 110 Federal (2d) 1022, under the name of Holmberg v. Merrick.

After the appeal was determined a rehearing was granted because of these circumstances: the affirmance of the decision was based upon the Supreme Court decision of Russell v. Todd, 309 U. S. 280, and a rehearing was granted after the Circuit Court had affirmed the decision in the Holmberg case. Consequently the appellees made an application in the Circuit Court and likewise asked for rehearing. The Circuit Court granted an extension of time to the appellees to await the outcome of the rehearing petition in the Supreme Court of the United States. In the meantime the case of Mencher v. Richards, which was relied upon by Mr. Justice Stone in his decision in the Russell case, had been taken to the New York Court of Appeals and because of that appeal the Supreme Court granted rehearing in the Russell case and, by the same token, rehearing was granted in the Holmberg case.

I then prepared an application and obtained leave to intervene as amicus curiae in the New York Court of Appeals and I filed a brief. The Court of Appeals rendered its decision, but did not squarely decide the question of the statute of limitations or the rule of laches involved. The United States Supreme Court then denied rehearing at 310 U. S. 658. The Circuit Court on the same day that the United States Supreme Court denied rehearing granted the appellees until June 5, 1940, and enlarged the time within which to apply for a rehearing or for reargument, and after the Supreme Court decision had been announced the appellees abandoned their application and the appeal became final.

Q. What did you do thereafter? A. Also having reserved jurisdiction against the persons who were named and not served as defendants, I continued to investigate the facts regarding three defendants particularly in the hope of instituting another proceeding to wind up this action. In the meantime I examined defendants in supplementary proceedings and made settlements and disposed of most of the actions against the other defendants.

The three defendants against whom I proceeded were Maude DuMont, who was the record owner of 12 shares of stock in the face amount of $1200, and one Nehemiah Freedman, who I had learned was the actual owner of $25,000 worth of stock registered in the names of his secretaries, Helen Lavelle and Helen Levy, both names having been given to the same secretary and used by Mr. Freedman.

Mr. Souza: If your Honor please, I move to strike out this testimony in regard to Freedman on the ground it is immaterial and irrelevant and not in any respect binding upon us as to what he did in regard to Freedman or Mrs. DuMont, either.

The Court: I will allow it.

Mr. Souza: Exception.

A. (Continuing) In December of 1941 or January of 1942 I instructed the process server to again make inquiries at J. S. Bache & Company and was then advised that Mr. Armbrecht was a former employee who was retired and receiving a small pension. I then consulted Loring Staples as one of the attorneys for the receiver in Minnesota, and advised him of my findings, and he told me to proceed against the other three defendants, namely, Nehemiah Freedman, Maude DuMont and J. S. Bache & Company and Charles Armbrecht. Based on the information I had received from the process server I then prepared the complaint in the first consolidated action and

issued a summons for service upon the members of J. S. Bache & Company and for service upon the defendant Charles Armbrecht.

The only defendant served as a member of the firm of J. S. Bache & Company was Mr. Stern. The marshal made a return that he could not find, after due diligence, Mr. Armbrecht.

I then made an application to have a private process server designated for the purpose of attempting service upon Mr. Armbrecht. That order was signed by this court on May 22, 1942, and it designated one Sidney J. Ginsberg as a private process server to act with the same force and effect as though service were made by a U. S. marshal.

In the meantime I sent a registered letter addressed to Mr. Charles Armbrecht, care of J. S. Bache & Company, 36 Wall Street, New York, and gave my home address, not my office address, and the letter was returned marked "Not found."

Mr. Fried: The letter I now offer in evidence as the one I sent and which was returned to me.

(Short recess.)

Mr. Souza: Does it appear on the record, if your Honor please, the date of the letter, Plaintiff's Exhibit 6? I do not recall that that was put on the record.

Mr. Fried: I have here the office copy.

Mr. Souza: No. What is the postmark stamp on it?

Mr. Fried: May 5, 1942, and there is one of May 6, 1942, and one May 12, 1942.

(Marked Plaintiffs' Exhibit 7.)

The Witness (continuing): I then applied for the order that I mentioned before, and it was signed May 22, 1942, permitting Sidney J. Ginsberg, a private process server, to effect service on the defendant Charles Armbrecht. We

had no other address for Mr. Armbrecht except care J. S. Bache & Company. When I received a telephone call from the attorneys for the defendant, asking for an extension of time, I advised them I could not grant the extension in view of the fact that I did not know the whereabouts of Charles Armbrecht. I was then told that Mr. Armbrecht resided at 1971 Webster Avenue, Borough of the Bronx, and I thereupon signed the stipulation extending the time of the defendant Stern to answer the complaint.

The defendant could not be served at that address but was properly served by the process server, Sidney J. Ginsberg, on May 29, 1942, at 2980 Valentine Avenue, Borough of the Bronx, which was the home of Mr. Armbrecht's son. In September of that year, 1942, I examined Mr. Stern at the office of Franklin S. Wood, which was then located at 120 Broadway, and then learned that according to the record of J. S. Bache & Company, Mr. Bache personally was supposedly the owner of the stock registered in the name of Charles Armbrecht. At that time I conferred with Mr. Souza and advised him in conversation that Mr. Armbrecht had been served and the case then was about to proceed to trial when I was served on March 24, 1943, with a notice of motion to quash the service of the summons and complaint on Mr. Armbrecht on the ground that he was never personally served with the summons and complaint. This motion was returnable on March 30, 1943, and hearings were held thereafter by United States District Judge Murray Hulbert, the process server in the meantime having gone into the Army, and there were first proceedings to take his deposition and finally we succeeded in obtaining his personal appearance in New York, but Judge Hulbert held that since the burden was on the complainants and we had not sustained the burden, that he would quash service of the summons upon the defendant Armbrecht. The order quashing the service was dated October 28, 1943.

Immediately after the order was signed I undertook to prepare a summons and complaint on behalf of the complainants, the same complainants that had been named in all the previous actions, and named Charles Armbrecht and Jules S. Bache as the defendants. These new summonses and complaints were filed on November 13, 1943, and both defendants appeared by the attorneys, Cook, Lehman, Greenman, Goldmark & Loeb, by notice of appearance dated November 30, 1943.

Q. How do you account for the time between the institution of the proceedings in Minnesota in July of 1932 and the entry of the judgment in the Holmberg case in January, 1939? A. The law relating to joint stock land banks was in a considerable state of confusion at the time that the Joint Stock Land Bank failed in 1932. The act which creates the liability merely states that the stockholders of a joint stock land bank are liable equally and ratably for the debts, contracts and engagements of such a bank. It did not provide for the manner of enforcement, nor did it create or designate the name of any official who could enforce the assessment against stockholders. Accordingly in one of the earliest cases that I examined in my research, Wheeler v. Greene, 280 U. S. 49, the Supreme Court of the United States held that the statutory receiver appointed by the Federal Farm Loan Board merely represented the bank itself, and as such receiver took possession of its records and books and stood in the same place as that of the bank. However, that receiver could not enforce the liability created by statute for the benefit of the creditors since it was not an asset of the bank.

As the result of the decision in the case of Wheeler v. Greene, the case came up regarding the St. Louis Joint Stock Land Bank, and in a reported decision, Partridge v. St. Louis Joint Stock Land Bank, 6 Federal Supp. 395, the Court held that in view of the decision in Wheeler v. Greene, it became necessary upon the failure of a joint

stock land bank to have two receivers appointed, one the statutory receiver which the Federal Farm Loan Board appointed, and the other a chancery receiver, to represent the creditors and enforce the assessment against the stockholders.

There were a number of decisions as a result of that case which then held that once the receiver was appointed by the domiciliary jurisdiction, that the action should be proceeded with as one at law.

In July of 1932, after the complainants instituted their action in Minnesota according to their research they proceeded upon the theory that once the assessment was determined in Minnesota and the assets and liabilities fixed, that that judgment would be res adjudicata in every other jurisdiction except for the personal defenses that could be asserted by defendants, and that case did not finish until 1935, and, as I have indicated, the decree was entered in the District Court of Minnesota on April 20, 1935.

The case was then referred to this jurisdiction and after our research we proceeded upon the theory that we would have to obtain the appointment of an ancillary chancery receiver and the original bill of complaint in the Holmberg v. Carr suit was framed upon that theory.

At the same time that that action was instituted here, or shortly thereafter, the creditors of the Chicago Joint Stock Land Bank had taken similar action in the domiciliary jurisdiction, and when they came to the Southern District of New York their complaint was one in equity for the assessment against the stockholders of the Chicago Joint Stock Land Bank upon the theory that it would avoid multiplicity of actions if all the defendants were named in the one suit.

The complaint in the Holmberg v. Carr case was sustained by Judge Patterson and the complaint in the case of Brusselbach v. Cagill, which related to the Chicago Joint Stock Land Bank, was dismissed by Judge Goddard.

Defendants in both cases took appeals to the Circuit Court for the Second Circuit and both orders were reversed. The opinions were written by the Circuit Court and are reported, Holmberg v. Carr, 86 Fed. (2d) 727, and Brusselbach v. Cagill, 85 Fed. (2d) 20.

The Circuit Court said that the decree entered in the foreign jurisdiction had no extra-territorial effect; that the receiver appointed by the foreign court could not enforce any assessment here; that it was improper to have an ancillary receiver because the only way that this action could be instituted would be as an original action in equity where an accounting would be sought and the assets and liabilities again determined, and in that action the assessment made against the stockholders.

In the meantime, in the Chicago Joint Stock Land Bank case, trial was about to come up before Judge Woolsey and they had intended to rely upon the decree of domiciliary jurisdiction by reason of the ruling of the Circuit Court for the Eighth Circuit. Judge Woolsey commented upon this situation in his decision in the Brusselbach case and said that there had been some question as to whether the attorneys in the Chicago case would rely upon that decree or not, but they awaited the outcome of a Supreme Court decision, Christopher v. Brusselbach, where certiorari was granted for the purpose of resolving the conflict between two circuits, and in that case, reported at 302 U. S. 500, the United States Supreme Court affirmed the ruling of the Circuit Court for this circuit and held that the action could only be one in equity and had to be instituted de novo in every jurisdiction for assessment against the stockholders.

The same uncertainty of the law was commented upon by Judge Woolsey.

> The Court: Had the issue of the insolvency and the liability of the stockholders to be determined in each one?
>
> The Witness: In each one, your Honor.

A. (Continuing) In the meantime we had obtained a number of decisions in other State courts; one in Massachusetts, and decisions in other State courts held that these were actions at law once the assessment was determined in the foreign jurisdiction, but since the decision of the Supreme Court all those decisions are no longer of binding effect.

The Court: Why was the jurisdiction in the in rem action in Minnesota binding?

The Witness: Since the United States Supreme Court in Wheeler v. Greene used some language where the action had to be brought in the "neighborhood", and they construed the "neighborhood" to mean where the stockholder resided, and we had construed "neighborhood" to be where the bank was situated.

The Court: But why is not the determination of the bank's condition final, as it were? Does not the receiver of the bank, the statutory receiver, represent the creditors for the purpose of determining that?

The Witness: He does not, your Honor.

The Court: Doesn't he represent them?

The Witness: He does not represent the creditors at all. He merely represents the bank. He is the assignee, as it were, for the bank.

The Court: All right. Go ahead.

The Witness (continuing): The Supreme Court then held we would have to institute separate actions in every jurisdiction. As a result of that we amended our complaint and then proceeded along the theory that the Chicago Joint Stock Land Bank case proceeded, and we amended our complaint accordingly, which was the one offered in evidence here, and ever since then I have been going on that theory.

The further time was occasioned by the question of laches which arose after the affirmance on the Court of Appeals of

the judgment entered by Judge Woolsey on January 23rd, and the reason for that was that the question of the application of the statute of limitations or the rule of laches had been given some confusion by the Courts.

The Court: If the lawyer miscomprehends the meaning of the decision and guides himself accordingly, isn't that a fact bearing upon whether or not his client is guilty of laches?

Mr. Souza: I do not think so. I do not see why we should be bound by his mistake.

The Court: Oh, I should think so. Everybody is liable to make mistakes. Is that all?

Mr. Fried: That is all.

Cross-examination by Mr. Souza.

Q. Mr. Fried, as a result of all the uncertainty in the law in respect of the actions which you say you instituted on behalf of the creditors, the present complainants, you did in fact start an action in 1937 in which Armbrecht and a great many others were joined as parties defendant? A. Yes.

Q. And that is the case of Holmberg v. Anchell, which you referred to? A. That is correct.

Q. And as I understand it, you say the marshal made a return in 1937 that Charles Armbrecht could not be found and therefore was not served? A. He returned to me all the printed complaints. I had given him a whole batch of them and he returned the printed complaints and returned the checks for the refund.

Q. And that included the complaint you had given to be served on Charles Armbrecht? A. That is right.

Q. He made no comment? A. He said "I could not find all these other defendants, Maude DuMont, Nehemiah Freedman, and a few others."

Q. And that was in May, 1937? A. Yes.

Q. What, if anything, did you do in the balance of 1937 to find Mr. Armbrecht? A. If my recollection serves me correctly, I asked Mr. Gillman of the Gillman Process Serving Agency to see if he could locate Mr. Armbrecht at Marion Avenue.

Q. When was this? A. I cannot give you the exact date. It was after the marshal had returned the complaints, because I had examined the file and found he was properly served at Marion Avenue in the action I referred to where there was a default, and I asked him to trace him, and he reported back and said he could not locate him and he could not be found.

Q. When did he report that? A. I would say the summer of 1937.

Q. Was that before or after you had made the personal investigation? A. Before.

Q. Was that report in writing or did Gillman give you that orally? A. No; it was oral.

Q. Was Gillman the process server that testified in the proceedings to quash the service upon Armbrecht brought before Judge Hulbert in this case? A. Well, he was one of the process servers, but he was not the process server who purportedly made the service on May 29th. That was Mr. Ginsberg.

Q. But he was the process server who hired the man who purportedly made the service? A. That is right.

Q. And he testified in this Court in that proceeding? A. That is right.

Q. Last year, in 1943? A. That is correct. I might also add, Mr. Souza, that as a matter of fact I had no information as to the identity of Mr. Armbrecht; whether he was the one we wanted or not.

Q. Did you ever look him up in the telephone book in the Bronx? A. I believe I did, and I think I found a Charles Armbrecht, Jr., listed.

Q. Did you call up Charles Armbrecht, Jr., to find out if he was the son of Charles Armbrecht? A. I never did.

Q. Do you know whether your process server did? A. I asked Mr. Gillman to locate him and gave him that information at the time.

Q. But you do not know what he did about it? A. My memory is hazy at this time, but——

Q. Have you any record which would show what you did? A. I might have my office diaries, if I check them back.

Q. Do you keep any records of what you do in this case? A. Of the important events, yes. I keep a record of daily events.

Q. Do you have a daily register? A. Yes.

Q. Have you got that register for the summer of 1937? A. I might have. I do not know. We moved since then and we threw out many records. The chances are they are at the office.

Q. If you have them will you produce them? A. I will be glad to.

The Court: Would you enter a telephone call with the process server?

The Witness: No, I only enter general proceedings.

Q. What, if anything, did you do after the summer of 1937 to locate Mr. Armbrecht for the balance of that year? A. I believe it was 1937 that I went up myself to Marion Avenue.

Q. Didn't you testify you went up there in the summer of 1938? A. I said that was to the best of my recollection but I do not think it was 1938, because in 1938 we were going to trial and I was preparing the case for trial before Judge Woolsey, and that took a great deal of time.

Q. You say your best recollection is you went up in the summer of 1937? A. I believe so. It was a hot day when I got up there.

Q. I am not interested in the condition of the weather, but I would like to know the date, or approximately the date, if you can give it, when you went up to find out whether Mr. Armbrecht still lived at the address at which he had been served, 2565 Marion Avenue, in August of 1936 in the Friede case? A. I think it was in August of 1937 to my best recollection.

Q. All right. Now what did you do after August, 1937, to locate Mr. Armbrecht? A. I prepared the case again for trial against all of the defendants.

Q. I asked you what you did to locate Mr. Armbrecht? A. There was nothing more to be done.

Mr. Souza: I move to strike out that answer as not responsive.

The Court: Yes, I will strike it out.

Q. I repeat my question, Mr. Fried, what did you do after the summer of 1937 to locate Mr. Armbrecht? What was the next step you took? A. I don't think I did anything after issue was joined by all the defendants and we were going to trial.

Q. So that your answer is that so far as Mr. Armbrecht is concerned, after August, or whenever it was in the summer of 1937, when you made the visit to 2565 Marion Avenue, the Bronx, you did nothing so far as locating Mr. Armbrecht is concerned? A. That is for that year, but as you recall, I testified subsequently——

Q. For the year 1937? A. Nothing further.

Q. What did you do in the year 1938? A. I do not believe we did anything more until after judgment was entered in the Anchell case.

Q. What was the next step after that judgment was entered on January 23, 1939, in the Anchell case, so far as locating Mr. Armbrecht was concerned, and when did you take it? A. I would say it was December, 1941, or January of 1942.

Q. That was getting close to the time, was it not, when the ten-year statute would run if that applied? A. Oh, definitely. That was one of the reasons why I had to rush it through.

Q. And did you at that time, that is, in December of 1941, or January of 1942, have some talks with the attorneys representing the bank in Minnesota, or the receiver of the bank in Minnesota? A. I had correspondence with them and I also met Loring Staples, who was a member of the firm of Cobb, Hoke, Benson, Kraus & Fagre, in New York.

Q. You met him in New York, or that firm was in New York? A. No, I met him personally right in front of this court house.

Q. Where was the office of that firm? A. In Minneapolis, Minnesota. I met him in the court house and he told me he had some Government job, and I discussed the matter with him and he told me to proceed.

Q. Throughout any of this period from the time you first got into the litigation in 1936 until say January of 1942, did you ever make any examination of the records of the bank to find any address of Charles Armbrecht? A. Yes, I wrote the bank and they told me that all they had was "c/o J. S. Bache & Co.", and that was the address we had.

Q. At the time you had this talk with the attorney from Minneapolis in January of 1942—was that it? A. No; it was the fall of 1941, I would say, or possibly the early part of 1942.

Q. Did you at that time discuss with him the possible liability of J. S. Bache & Co.? A. Yes. I told him I had received information that J. S. Bache & Co. had retired Mr. Armbrecht, and that I suspected that he was merely the nominal owner; and he said they have a number of situations where they bring suit against people they deem beneficial owners to discover whether that is actually the case, particularly where it is a Stock Exchange house.

Q. And that was as true in 1936 as it was in 1941 or 1942, wasn't it? A. Which bank are you referring to?

Q. That they were beneficial owners of the stock? A. No, the thing that I suspected was when I received the information that Mr. Armbrecht was a former employee. As far as the records indicated he might have been a customer and in good faith it might have been transferred out, and it was only when we discovered he was a retired employee and was receiving a pension that our suspicions became aroused as to the real ownership.

Q. Wasn't any attempt made to serve Charles Armbrecht at the office of J. S. Bache & Company? A. Very definitely.

Q. When? A. All the time.

Q. What do you mean by all the time? A. Well, the first thing we did in 1935, we sent them a demand letter, addressed to that address. Mr. Wood sent a letter dated October 19, 1935. Then after that in the case of Friede v. Armbrecht I issued service of a summons and complaint in Mr. Friede's name, and that was served on Mr. Armbrecht, according to the records, at 2565 Marion Avenue. It was after I had given it to the process server that he located Mr. Armbrecht, and I believe at that time—now it comes back—he might have received the information from his son then of Mr. Armbrecht's whereabouts.

Q. That was in 1936? A. Well, he was served on August 13, 1936, but after his default I still did not know whether he was the right one or not.

Q. What effort did you make to find out? A. I tried to enter judgment after that and I found out he had moved and could not be located.

Q. How soon after the service in August of 1936 did you try to locate him? A. Well, when the amended complaint was prepared.

Q. When was that? A. 1937. It was after the mandate was signed by Judge Patterson, and it was then when the marshal said he could not serve him, that I again contacted this process server.

Q. Did you ever try to find out whether as a matter of fact J. S. Bache & Company were ever record holders of any of this stock? A. Not prior to the information I received in 1941, and there was no occasion for me to do that.

Q. Did you make any inquiry in 1941 as to whether J. S. Bache & Company were ever record holders of any of the stock? A. Well, I say the information that I received, that he was a retired employee——

Q. What is that? A. That Mr. Armbrecht was a retired employee and that he held some subordinate position.

Q. And you got that information you say when? A. I would say that was December of 1941 or January of 1942.

Q. Did you ever make any inquiry as to whether or not —that is, of the bank or its receiver—their records showed that J. S. Bache & Company were the record owners or holders of any shares of stock of the Southern Minnesota Joint Stock Land Bank of Minneapolis. A. No, I never suspected that they were the real owners of the stock in the name of Charles Armbrecht. As far as I was concerned he was the real owner.

Q. Now since that time you have received photostatic copies of some stock certificates, have you not? A. Yes.

Q. I show you these photostatic copies and ask you whether or not those are the ones you have received.

The Court: Do you have to sue the record holder also in order to get judgment against the beneficial owner?

The Witness: No, your Honor.

A. If these are the photostats I sent you, and they seem to be, they are from the records, photostatic copies of the records of the bank.

Q. And they are the copies you received direct from your representative out there, aren't they? A. Yes. Are they—my copies or yours?

Mr. Souza: I took them right from on top of your file here.

The Witness: Yes.

Mr. Souza: I offer them in evidence.

(Marked Defendants' Exhibits A, B and C.)

Mr. Souza: If your Honor please, may I identify these for the record. Defendants' Exhibit A is a photostatic copy of a certificate of stock No. 6098 for 10 shares to the order of J. S. Bache & Co., dated December 9, 1925.

Defendants' Exhibit B is a certificate of stock for 80 shares to the order of J. S. Bache & Co., dated February 11, 1924; and

Defendants' Exhibit C is a photostatic copy of certificate No. 6038 for 10 shares to the order of J. S. Bache & Co., and it is dated November 17, 1925.

The Court: What is the materiality of this?

Mr. Souza: The materiality is that if Mr. Fried had made an investigation it would have disclosed at that time that there was a disclaimer endorsed on each of these certificates that J. S. Bache & Co. was the owner of this stock. It appears on each one of those certificates now in evidence, and it was from those three certificates that the two certificates for 50 shares each, aggregating 100 shares, which stood in the name of Charles Armbrecht in 1932 were transferred. These certificates all have endorsed on them—it is rather difficult to read and I have put them through a magnifying glass—a disclaimer, and I will read it with your Honor's permission:

"We hereby certify that the transfer of the within shares to the names indicated by the star is made solely to complete the purchase made by us for our customer, and we have no ownership or interest therein."

That has a bearing directly on the claim against J. S. Bache & Company. That is in the first action.

The Court: Do you think anybody is under an obligation to go into the question of the stockholders before the date of the insolvency.

Mr. Souza: They are making the claim that J. S. Bache & Co. is the owner of this stock.

The Court: What stock?

Mr. Souza: The stock in suit.

Mr. Fried: That is not that stock.

Mr. Souza: Exhibits A, B and C were transferred into the 100 shares that stood in the name of Charles Armbrecht.

The Court: I do not see that there is any more importance to that than if they were transferred to my name.

Mr. Souza: But here he says he grew suspicious that J. S. Bache & Company were the owners of this stock.

The Witness: Not from that.

The Court: From the Armbrecht stock?

The Witness: But not from that fact.

Mr. Souza: And I want to show that he made no investigation to find out whether they were or not before he brought this suit, when there was a statement on record that they had no interest in these 100 shares and they were bought for a customer.

Q. As I understand it, you never saw the originals of these photostatic copies, Defendants' Exhibits A, B and C? A. I think I saw the originals but I did not pay any attention. They were all here at the time we had the trial before Judge Woolsey, but there was no occasion for me to go beyond the record ownership. It was only coupled with the additional information I received that that became significant.

Q. In any event, whether there was occasion or not, you did not do it? You made no investigation? A. There was no reason.

Mr. Souza: I move to strike out "there was no reason."

The Court: You did not, anyway.

The Witness: I did not.

Q. When did you first learn that J. S. Bache & Company were not the beneficial owners of the 100 shares standing in the name of Charles Armbrecht? A. When I examined Mr. Stern.

Q. And that was when? A. September of 1942.

Q. Did you at that time, or immediately thereafter, make any attempt to bring in Mr. Jules S. Bache? A. No.

Q. You did not do that until— A. The following year.

Q. And that was in November, 1943? A. Yes, that is right.

Q. Did you at any time after you started the action in 1937, personally make any inquiry of J. S. Bache & Co. as to where Charles Armbrecht could be located? A. I personally?

Q. Yes. A. No.

Q. Did you ever ask them whether or not Charles Armbrecht was a customer of theirs? A. No.

Q. Or whether he was an employee of theirs? A. No.

The Court: Why didn't you?

The Witness: There was no occasion for me at that time, because Charles Armbrecht, so far as we knew, had been served at Marion Avenue. It was not until subsequently that he had moved and there was no suspicion on our part that he was anything but a regular customer. The process server said he had made inquiries there originally and he could not locate him there.

Q. Did you see the two stubs of the certificates aggregating 100 shares which you put in evidence as Plaintiffs' Exhibits 1 and 2? A. Yes.

Q. You saw them when the originals were here in 1937 or 1938, in the trial before Judge Woolsey, did you not? A. I saw the original books that were here.

Q. You saw them, didn't you? A. The books were here and I just thumbed through them. I do not think I paid any particular attention to Armbrecht.

Q. Did you see that the original receipt for the stock in the name of Charles Armbrecht had been signed by J. S. Bache & Company? A. Yes. It has a rubber stamp. That is the usual receipt signed by a stock brokerage firm for its customers.

Q. Did you call up J. S. Bache & Company to find out where the customer was? A. No; I say the process server made attempts to locate Mr. Armbrecht and reported that he was unsuccessful.

Mr. Souza: I move to strike out what the process server did.

The Court: Denied.

Mr. Souza: Exception.

The Court: I have forgotten how you got the Marion Avenue address.

The Witness: The Marion Avenue address was where he was served by the process server after he reported to me he found it in the City Directory.

Mr. Souza: That is all.

(Recess until 2:10 P. M.)

AFTERNOON SESSION.

Mr. Fried: Your Honor, I have here a copy of an affidavit of mailing dated August 23, 1932, by Florence Halling, who was a secretary in the office of John Benson and Loring M. Staples, and it indicates that a copy of the order which is annexed to the affidavit was mailed to all of the record stockholders of the bank. This same affidavit was offered and received in evidence before Judge Woolsey. Of course it is not the best evidence. I realize that.

The Court: Best evidence of what?

Mr. Fried: Of the actual mailing. I could bring this witness here from Minnesota or take the deposition merely to show that this copy of the order was mailed out to the record stockholders annexed to that list. If my adversary will concede that if the witness were called she would testify she mailed out the copy of this order, I believe that is all I have for the complainants.

Mr. Souza: I won't concede that, if your Honor please, because I don't think it is material. It might have been material in that other suit for some specific purpose but I do not see that there is any point about it in this suit.

The Court: I will overrule the objection as to materiality. Is that the only objection?

Mr. Souza: That is all.

Mr. Fried: I offer it in evidence.

Mr. Souza: None of the defendants are named here.

Mr. Fried: Just Armbrecht.

(Marked Plaintiffs' Exhibit 8.)

Mr. Fried: I have a copy of a letter dated October 19, 1935, addressed to Mr. Charles Armbrecht, c/o J. S. Bache & Co. This is taken from the records of our office and it was sent by Miss Vendoza, who is now on a week's leave of absence because her husband is home from the Army.

I can have her here any time after next week to have her testify she mailed this out to Mr. Armbrecht at this address.

Mr. Souza: It appears that this letter of October 19, 1935, is addressed to Charles Armbrecht, and it is a demand made by whoever signed it as counsel to the receiver, Ervin J. Friede, and I understand that receivership was of no force and effect as it later developed, so I do not see what the purpose of it is. There is no evidence that he ever got it.

The Court: Have you any objection to the manner of proof?

Mr. Souza: Not the manner of proof, no.

The Court: I will overrule the objection.

Mr. Souza: Exception.

(Marked Plaintiffs' Exhibit 9.)

Mr. Fried: I have two more letters, your Honor, and that is the end. These are letters addressed to Charles Armbrecht of the Armbrecht Lumber Company, dated October 1, 1935, and a reply from Mr. Armbrecht saying he never owned shares of stock in the bank. I offer them solely for the purpose of showing some of the efforts exerted by our office in attempting to locate Mr. Armbrecht.

Mr. Souza: I object on the ground that they are irrelevant and immaterial.

The Court: I will take them.

(Marked Plaintiffs' Exhibits 10 and 11.)

Mr. Fried: That is the complainants' case.

Mr. Souza: Now, if your Honor please, I move to dismiss the cause of action against J. S. Bache & Company and the individual members of that firm on the ground that nowhere in the evidence does it appear that J. S.

Bache & Company, or any member of the firm, were the beneficial owners of any of the stock in suit.

The Court: What was that testimony that was read from the first deposition?

Mr. Fried: That was Mr. Stern.

The Court: What did he say?

Mr. Fried: He said that the firm records indicated that the stock had been transferred, or indicated that Mr. Bache personally was long 100 shares of stock as of the date in the exhibit. In other words, that they had charged it out to his personal account.

Mr. Souza: Mr. Stern testified that on May 2, 1932, at the time the bank failed, the records of J. S. Bache & Company showed that the stock was the property of Jules S. Bache and it had been in his account from at least October of 1931, and was in his account until it was delivered out in January of 1933.

Mr. Fried: As I stated to your Honor before, it was only for the purpose of discovery and inspection that we proceeded against Bache & Company, and once having obtained that, there is still a question in my mind whether Bache & Company would not be liable along with Mr. Bache for having joined in the means of secreting the information from the creditors.

The Court: I am not sufficiently familiar with the statute. I will reserve decision.

Mr. Souza: In connection with my motion, if your Honor please, I also call your Honor's attention to the fact that in connection with this specific transfer of the stock to the name of Charles Armbrecht, that at the time the record shows that there was a disclaimer on the part of J. S. Bache & Company that they were the owners of the stock or had any interest in it, and there is no transfer out of Armbrecht's name from January of 1928 until the present date. Your Honor will see from these Exhibits 1 and 2——

The Court: I will reserve decision. If there is nothing

in the language of the statute tying them up, I will grant it. Have you the statute there?

Mr. Souza: You mean the one they are suing under?

The Court: Yes.

Mr. Souza: I do not have it here, no, sir.

The Court: I will reserve decision.

Mr. Souza: I call your Honor's attention to certificates Nos. 7079 and 7080, the receipts for which were signed by J. S. Bache & Company on January 23, 1928, showing that certificate 7079 was transferred from J. S. Bache & Company to Charles Armbrecht, and certificate No. 3049, which is defendants' exhibit——

The Court: I would not regard that as evidence of anything unless you pointed out where I am wrong. Supposing I had stock in my name and stock might be issued to you in consideration of the certificate I turned in? Supposing I owned stock and it is with Bache & Company. The certificate you buy might be issued in lieu of the one I turned in, yet it would not have anything to do with the actual ownership.

Mr. Souza: If J. S. Bache & Company put a disclaimer on the certificate it would be some evidence of it and that you knew it, and it bears on any possibility of any question of fraud or hiding anything. These Exhibits 1 and 2 show that this stock issued in the name of Armbrecht was transfered from J. S. Bache & Company and the three certificates are in evidence that it was transferred from. It was never out of Armbrecht's name. Also you have the positive testimony of Mr. Stern, which is the only evidence in this case, that the stock did not belong to J. S. Bache & Company but belonged to Jules S. Bache; that Jules S. Bache was the beneficial owner, and the pleadings show that.

The Court: I think it is a good motion but I will reserve decision on it.

Mr. Souza: As to the cause of action against Charles Armbrecht, which is the second action, I move to dismiss that on the ground that the evidence is that the action was commenced against Charles Armbrecht on November 17, 1943, and Mr. Fried said that the summons and complaint were delivered to the marshal for service, which I believe is the commencement of the action on the 13th of November, 1943, which was more than eleven years, eleven years and six months, from the time the cause of action accrued.

The Court: How about it?

Mr. Fried: As to that, your Honor, I have briefed it carefully and I will hand my brief to your Honor. It will be finished by the time I get back to the office. Judge Woolsey specifically held in the previous case that the statute of limitations is not the rule by which you measure actions in the Federal courts solely cognizable in equity, and there are many, many decisions, and it is a very confusing field, because first you have the question of law relating to concurrent remedies, and in those cases, equitable cases must follow the actions at law, and apply whatever the legal statute of limitations is if there is a concurrent remedy, and then you have the second branch of cases which hold that where you do not have a State court situation, then the Federal courts apply their own rule of equity, and a number of cases which say that in the Federal courts even in equity, by analogy only, they will apply the statute of limitations. The same question came up before Judge Patterson in the Todd v. Russell case, and he pointed out clearly, and it has been sustained since, that the defense of the statute of limitations is not good as a defense, but it is an element to be considered on the question of laches; in other words, if you go beyond a statutory period, then you have to examine as to what the complainants did. Were they diligent in the prosecution of their claim? The same question was presented to Judge Woolsey and he found that the rule of laches is the one that must be ap-

plied here and he cited at length from the Southern Pacific v. Baker case, and on this case, while Judge Woolsey for some reason thought there was no reason for the confusion that existed in the law relating to joint stock land banks, he nevertheless held there was confusion and he pointed out all the conflicting decisions and said that in view of that state of the law it was no wonder that the complainant had delayed as long as that. As a matter of fact it was conceded in that case that if any statute applied, it was not the three-year statute, and he left that out and said inasmuch as it is in equity I will consider it on the question of laches.

Mr. Souza: In other words, there is a statute, 53 of the Civil Practice Act, which is a comprehensive statute, in this State, and which covers all proceedings, including proceedings in equity that are not otherwise specifically covered by some other statute of limitations, and that statute has been held frequently by the Court of Appeals, and I will submit you in due course a brief on that specific point, that it applies to every kind of action in equity. The cases which Mr. Fried has referred to were decided before the new equity rules went into effect in 1938 or cases that had been started, so that the question of extending the time or shortening the time by the statute of limitations could not be used. But in all cases that have started since 1938 the distinctions between actions in equity and actions at law were abolished by those new rules.

Now to come into this court and say that the ten-year statute does not apply to an action in equity is to write into the statute some express exception, such as here, an action brought by a joint stock land bank, and there is no such exception in the statute. It is comprehensive and takes in all classes of equity actions where no other limitation applies. In fact it takes in all classes of law actions.

In the case of Judge Woolsey, there was a question

whether the three-year statute applied because of the fact they waited two years and some odd days after the decision in the Minnesota case before they started the action in New York. That was decided in 1935 and this action was commenced in 1937, and for that reason Judge Woolsey held that there was no question of the statute of limitations, and on the question of laches, because of the shortness of time, there was no question of laches and held against the defendant's contention on that particular point.

The Court: You say you are going to write a brief on this, so I do not think extended argument is necessary.

Mr. Souza: I will submit a brief, and if your Honor will let me have the copy which I gave you I will combine it all in one brief so your Honor does not have to bother with a lot of papers when you finally get to it.

I also move that if your Honor should hold that the ten-year statute does not apply, but that laches is the rule by which the conduct of the complainants is to be governed, that it also appears affirmatively that these complainants were guilty of laches in bringing their action against Mr. Armbrecht; that he was served, it appears, in 1936, by the attorneys representing these same complainants in the Fried action, and that they merely rested on a statement of a process server that he could not locate him in 1937 when the other action was started, and that they did practically nothing until he was served in 1943, more than eleven years and seven months after the cause of action accrued. Now that is as to the defendant Armbrecht.

As to the defendant Bache, I move to dismiss the complaint on the ground that it affirmatively appears from the complainants' proof and the pleadings that more than ten years have elapsed since the cause of action arose against Mr. Bache, and that therefore the action is barred by the ten-year statute of limitations, being Section 53 of the

New York Civil Practice Act. If your Honor should hold that that statute of limitations does not apply then I also move to dismiss on the ground that it appears affirmatively that these complainants have been guilty of laches in not proceeding against Mr. Bache at an earlier date.

The Court: I will reserve decision on all motions because they really all hang together, but I do not mind saying that I think the defense of laches is not very well sustained so far by the plaintiffs' case. I think he has filled in his time pretty well. I think it would be a pretty harsh rule to find a man guilty of laches by ignoring the efforts of the process server, or, if you want to call it, the misrepresentations of a process server for a period of six months or even a year. The expiring of time alone does not mean anything. I will reserve decision on all motions.

Mr. Souza: Exception.

MORTON F. STERN, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

The Court: Is there any fraud in a man carrying stock in a name other than his own name?

Mr. Souza: Definitely not.

Mr. Fried: Judge Woolsey used that expression, your Honor, where a beneficial owner uses someone else as a shield, and he indicated that from that fact alone, and there are some cases sustaining that view, that is, where I am the real owner of stock and use a person who is irresponsible as the record owner, that that fact is indicative of fraud on the creditors of the bank.

Mr. Souza: There is no such holding that I know of, and on the contrary the Gibbs case holds to the contrary and also Frederick v. Aaron, in 264 N. Y. 368, and no obligation rests upon equitable grounds for failure to make a transfer.

The Court: That is what I think would be sound law. There must be any number of reasons that a man can give readily for carrying stock in a name other than his own.

Mr. Fried: That is true, but where he was an irresponsible party——

The Court: That does not relieve you of liability. That is the reason you are suing here.

Mr. Souza: That is exactly the holding in the Gibbs case in 118 Fed. (2d) 958.

Mr. Fried: They mention that in the case as an indication. It might well be your Honor won't consider it fraud, but at the same time——

The Court: I think in a given case it might have a fraudulent element in it, but the mere fact of the carriage of stock in another's name is no evidence of fraud at all, prima facie.

Mr. Fried: There is this element, and it is that aspect of the case that I think is particularly cogent, and that is the testimony of Mr. Armbrecht shows he did not know about it. Now if I am to put stock, for example, in the name of my wife, with her full knowledge, I might not be guilty.

The Court: I said before it might be an element of fraud but your client has nothing to complain about, but Mr. Armbrecht had.

Mr. Fried: Our complaint is that if they had known the real and beneficial owner, they could have proceeded sooner.

The Court: Anyway, I have reserved decision.

Direct examination by Mr. Souza.

Q. Mr. Stern, you are one of the defendants in this action? A. I am.

Q. You are a member of the firm of J. S. Bache & Company? A. Yes, sir.

Q. How long have you been a member of that firm? A. Twenty-five years.

Q. Prior to 1938, where was the office of the firm in New York City? A. Prior to 1938?

Q. Yes. A. In 42 Broadway for about thirty-odd years.

Q. And when did you move from 42 Broadway? A. I believe it was in December, 1939.

Q. And since that date you have been where? A. 36 Wall Street.

Q. Were you in your office Friday of last week? A. Friday just past?

Q. Yes. A. Until about ten minutes of seven.

Q. At 36 Wall Street? A. That is right. It is also known as 40 Wall. We have a private entrance and that is why we designate it as 36 Wall. It is really the Bank of Manhattan Building.

Q. You can go into the building through Pine Street and also Wall Street? A. That is correct.

Q. Were you in your office on Saturday of last week? A. I left early. I left at quarter of one.

Q. What time did you get down to your office? A. Nine o'clock.

Q. Were you at home on Friday night, at your residence? A. All evening.

Q. Where do you live? A. 115 Central Park West.

Q. Have you a telephone there? A. I have.

The Court: What difference does it make? You can ask all these questions over again if you want to.

Mr. Souza: Counsel made a statement that Mr. Stern had been evading service and that the process server told him he could not get him.

The Court: Lawyers are compelled to believe process servers. That is one of the hardships of prac-

ticing law. I don't think there is any importance in this testimony.

Q. Mr. Stern, have you any record of J. S. Bache & Company that will show the original transaction of this stock being transferred from J. S. Bache & Company to Charles Armbrecht? A. I could not answer that. That would be the bookkeeping department or the cashier's cage.

Q. How long have you been a broker? A. Thirty-nine years.

Q. In New York City? A. That is right, with Bache.

Q. And are you familiar with the custom in respect of the registration of stock in the names of others, for customers and others? A. Oh, yes.

Q. What was the custom in 1932 and for five or six years previous to that in regard to having stock registered in the name of nominees?

Mr. Fried: I object to that, your Honor.

The Court: Was there a custom?

The Witness: Yes, we had two nominees besides our own name, both of them working in the cage.

The Court: What is your objection?

Mr. Fried: I object on the ground that any general custom they might have had is no proof of what was done in this particular case.

The Court: I will allow it.

Q. Was Charles Armbrecht an employee of J. S. Bache & Company? A. For about fifty years.

Q. Do you recall at or about the time he was pensioned? A. I was trying to refresh my memory on that. I am a little hazy. Armbrecht had an accident, his son told me during recess, about 1928. I would have thought it was a little later than that because my recollection is the new firm formed in 1933 and that was when we told Charlie he

would draw his salary as long as he lived. We had no pension fund, and it was my own idea, and Ed Weiss and myself told him to go ahead, as long as he lived he would get his weekly salary, but his son seems to think it was a little earlier than 1933, but it was in that period.

Q. Do you know of your own knowledge whether Mr. Armbrecht was a frequent visitor at J. S. Bache & Company at 42 Broadway after he was pensioned? A. Mr. Armbrecht comes down there once every week, or once every two weeks. He was there only two or three days ago. He comes down every week or two weeks.

Q. Would you say that was so during the years 1936, '37, '38, '39, 1940 and 1941? A. I would say it has always been so since he was retired, unless he happened to be laid up sick for a week or so, but he is rarely sick.

Q. Wasn't there a time in 1942 when you used to mail him his check? A. 1942? That I would not know. All I can say is that Charlie always comes in my office and pays me a visit whenever he is down, and that is very frequently.

Q. And he was down there last week? A. Last Tuesday or Wednesday.

Mr. Souza: That is all.

Mr. Fried: No questions.

WILLIAM GRAHAM, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Souza.

Q. Mr. Graham, how long have you been with J. S. Bache & Company? A. A little over twenty-five years.

Q. What is your position there? A. I am in charge of the records and credit department.

Q. Have you made a search for the records of J. S. Bache & Company for the period prior to October, 1931? A. I have.

Q. Are there any such records in existence? A. I have not been able to find any.

Q. What is the earliest record you have of J. S. Bache & Company in respect of the stock, the 100 shares of stock in question, in this suit? A. October 1931.

Q. I show you Plaintiffs' Exhibit 4, and ask you whether or not that is a correct transcript of the stock record in respect of the 100 shares of stock which we are now discussing? A. That is right. That is a photostatic copy of the stock record on the sheet, Southern Minnesota Joint Stock Land Bank of Minneapolis.

Q. Is that the only record you have in regard to this stock? A. That is the only record I could locate.

Q. Was this record made under your supervision? A. It was.

Q. Can you tell me what this reference to "J. S. Bache long account 100" under the date of October 1931 means? A. That means that in the J. S. Bache long account there were 100 shares of Southern Minnesota Joint Stock Land Bank of Minneapolis.

Q. Were you familiar generally with the J. S. Bache long account? A. I was.

Q. What was the type of that account? A. It was a margin account.

Q. And that stock continued in that account for how long? A. Until January of 1933.

Q. What date in January? A. On January 3 of 1933, the total of the account was transferred to a loan account.

Q. In other words, the stock was merely changed from the long account to the loan account? A. From the long account to the loan account.

Q. And still in Mr. Bache's name? A. The account was still in Mr. Bache's name.

Q. What is the long account? A. Just the title of the account. They changed the name from "long" to "loan."

Q. What is the difference? A. There were some regulations came up then made by the SEC. The SEC was just starting to come into prominence and they decided that they should turn the accounts to say just what they mean.

Q. In other words, a long account was really a loan account? A. It really means a loan account; the firm loaned money against the collateral in that account.

Q. So that actually there was no transfer of any kind? A. There was only a bookkeeping entry.

Q. Now did that stock remain in this loan account there until January 6, 1933? A. Yes.

Q. What happened then? A. The certificate was delivered out of the office.

Q. During the period referred to, and from that exhibit, after January of 1933 where was the physical possession of the stock certificates which stood in the name of Charles Armbrecht? A. It was in the vaults of J. S. Bache & Company.

Q. Does that show on that record? A. Yes, it shows it was in what we call box 1; there were a number of boxes in the cashier's department.

Q. There are some other notations on here. For instance, May of 1932, and December and January, up above. Do those entries have any significance? A. Well, the first two, the May and the December mean that the stock was carried forward for the purpose of auditing. We had outside auditors come in and check our records, and they carried forward all the stock at those periods. The January entry indicates that the sheet was closed or that they carried forward something.

Q. Have you any records which will show when Mr. Jules S. Bache first became the owner of that stock? A. I have no records in the office.

Q. Have you any personal recollection of the transaction? A. I have a recollection of a previous stock record to this which I cannot locate.

Q. Can you from your recollection of those records give us a date when Mr. Bache acquired this stock? A. My recollection is that the stock belonged to or was the property of the Winona Development Company.

Mr. Fried: I object to that.

The Court: It sounds like incompetent evidence, doesn't it?

Mr. Souza: I will withdraw the question.

Q. And you have no records now that will show whether Mr. Bache or someone else was the owner of that stock previous to October, 1931? A. No. I cannot locate that.

Q. What happened to all your records? A. Our records were all destroyed in order to make room for a new warehouse. At least we had two warehouses, two old-fashioned warehouses, and we rented a new one, and there was not room enough in the new one to put all the old records in.

Q. When did you do that? A. Some time around 1937 or 1938.

Q. At that time you say the records previous to October of 1931 were destroyed? A. That is right.

Q. Do you know Charles Armbrecht? A. I do.

Q. When is the last time you saw him? A. I saw him last week.

Q. Do you remember what day? A. Tuesday or Wednesday.

Q. Where did you see him? A. In the office. He always came to see me out in front of the window of the room I sit in.

Q. What was the practice of Mr. Armbrecht so far as coming to the office of J. S. Bache & Company is concerned, during the years previous to 1942, as far back as the time

he was pensioned? A. Well, he used to come down to pick up his salary.

Q. How often would that be?

Mr. Fried: I object to this line of testimony, your Honor.

The Court: I do not see that it has any bearing on the issues.

Mr. Souza: They say they used reasonable diligence in effecting service upon Mr. Armbrecht, at which time they might have discovered this situation, that Jules S. Bache was the owner of this stock and not Charles Armbrecht. They have delayed from 1937, from the time the marshal said he could not do anything until they served Armbrecht in 1943, when actually he was right in the County of New York and in the County of the Bronx, as I will prove in a few minutes, throughout this entire period. Any half-hearted investigation, any telephone call to J. S. Bache & Company, would have disclosed that fact.

The Court: I do not think that follows at all. He might have been in every day but it would not follow from that that a telephone call or personal visit would find out anything about it. I do not know that any of the Bache people would tell any process server anything about him. Why do you think so?

Mr. Souza: Because all they had to do was ask the question. They discovered when they asked the question but they waited eleven years to ask.

The record shows in this case that the marshal on the return, when he said he could not find Mr. Armbrecht, and when Mr. Fried got his order to get another process server to make service on him in 1942, made the notation on the record that he comes into the office of J. S. Bache & Company, Inc. Where did he get that information unless they told him? Where did

he get the information that he worked for J. S. Bache & Company unless J. S. Bache & Company told him?

Mr. Fried: At that time it was already in the complaint, I may point out to your Honor, because I had the information that he was a retired employee.

The Court: I do not see anything in that. Of course it is in the evidence now that he has been in to the offices of J. S. Bache & Company weekly, and I believe it.

By Mr. Souza:

Q. Do you recall that you had any time received any inquiries from anybody, prior to May of 1942, for the address of Mr. Armbrecht?

Mr. Fried: I object to this as incompetent.

The Court: I will allow it.

A. No.

* * * * * * *

Mr. Souza: That is all.

Mr. Fried: I have no questions.

CHARLES ARMBRECHT, JR., recalled, testified further as follows:

Direct examination by Mr. Souza.

Q. Are you here today pursuant to a subpoena which I caused to be served upon you? A. Did I receive it, did you say?

Q. Are you here today pursuant to a subpoena which I caused to be served upon you? A. Yes.

Q. Are you the son of Charles Armbrecht, the defendant in this action? A. Yes.

Q. Where does your father reside? A. 2643 Davidson Avenue.

Q. How long has he resided there? A. Somewhere in the neighborhood of from about 1939 to the present date.

Q. *And* before that where did he reside? A. 1971 Webster Avenue.

Q. Also in the Bronx? A. Also in the Bronx.

Q. How long was he at that address? A. From 1936 until —the end of November, 1936, when my mother died, he moved to 1971 Webster Avenue.

Q. And before November, 1936, where did he reside? A. 2565 Marion Avenue, in the Bronx.

Q. How long did he reside there? A. About three years.

Q. Do you know where he resided prior to that? A. 307 East 188th Street.

Q. How long to your knowledge has he resided continuously in the Bronx? A. Since 1905.

Q. Do you know of your own knowledge whether or not your father was a frequent visitor at the office of J. S. Bache & Company, 42 Broadway, following the time he was pensioned?

Mr. Fried: I object to the form of the question. I think it is incompetent unless he accompanied him.

The Court: Do you know it?

The Witness: Yes, sir.

The Court: All right, go ahead.

A. After he was pensioned he went down every week to get his pay until about 1942, when they sent him a check every two weeks, and then he would go down and cash the check down town.

Q. Have you resided in the Bronx for the last fifteen years? A. Twelve years, since 1932.

Q. Has your name been in the telephone book since that time? A. Since October 1st, 1932.

Q. You have been friendly with your father throughout all that period, haven't you? A. Yes, sir.

Mr. Souza: That is all.

Mr. Fried: No questions.

MORTON F. STERN, recalled as a witness on behalf of defendants, testified further as follows:

Direct examination by Mr. Souza.

Q. Mr. Stern, you mentioned the practice or custom of having stock in the name of nominees. When stock was carried in a margin or loan account, was it the usual thing in 1930, 1931, 1932 and 1933, to carry stock in the name of a nominee in the margin account of the customer?

Mr. Fried: I object to the form of the question. I think it is incompetent. The only relevant question is, what was done in this case.

The Court: I really do not understand the question. What do you mean by that being the usual thing?

Mr. Souza: I want to show, if your Honor please, that there are thousands of stock certificates carried by brokers in the names of nominees for their customers, and particularly in connection with loan accounts it is the usual thing.

The Court: I would think that I could almost take judicial notice of the fact that a lot of certificates down in Wall Street are not in the names of the real owners. I would not have any doubt about it if you never proved it.

Mr. Souza: In view of your Honor's statement I won't take up the time of the court.

The Court: I do not know whether I can take judicial notice of it, but I know it to be the fact. I assume everybody knows it. If it is going to be a material fact you had better have your witness say so.

Q. Mr. Stern, is it the fact that where customers maintain margin accounts with brokers, that the stock is carried in a street name sometimes and sometimes in the name of the nominee?

Mr. Fried: May I object on the ground that it is utterly incompetent and irrelevant.

The Court: Overruled.

Mr. Fried: I respectfully except.

A. Shall I answer it at length and explain the Wall Street practice, or the practice which was and still is in effect?

The Court: You can say just yes or no on that question.

The Witness: It is very unusual to carry a stock in the owner's name where it is carried on margin.

Q. Was this account of Jules S. Bache a margin account? A. It was.

Q. With J. S. Bache & Company? A. Yes, sir.

Mr. Souza: That is all.

Mr. Souza: That is the defendants' case, if your Honor please.

The Court: I will consider all your motions are renewed and I again reserve decision. I will assume the plaintiffs move for judgment and I reserve decision on that.

Plaintiffs' Exhibit 1.

SOUTHERN MINNESOTA JOINT STOCK LAND BANK

OF REDWOOD FALLS, MINNESOTA

CERTIFICATE No. 7079

For ..... 50 ..... Shares

Issued to

CHAS. ARMBRECHT

c/o J. S. Bache and Co., 42 Broadway New York

Dated 1/20 1928

Transferred from J. S. BACHE AND Co.

Dated ..... , 19

No. Original Certificate	*No. Original Shares*	*No. of Shares Transferred*
3049	80	50

Received of the

SOUTHERN MINNESOTA JOINT STOCK LAND BANK

OF REDWOOD FALLS, MINNESOTA

STOCK CERTIFICATE

No. 7079 — For 50 Shares of Stock

Date Jan 23 1928

Signed J. S. BACHE & Co.

Permanent Address 42 Bway N Y City

Plaintiffs' Exhibit 2.

SOUTHERN MINNESOTA JOINT STOCK LAND BANK

OF REDWOOD FALLS, MINNESOTA

CERTIFICATE No. 7080

For 50 Shares

Issued to

CHAS ARMBRECHT

c/o J. S. Bache & Co., 42 Broadway N. Y. C.

Dated 1/20 1928

Transferred from J. S. BACHE AND CO.

Dated , 19

No. Original Certificate	*No. Original Shares*	*No. of Shares Transferred*
3049	80	30
6098	10	10
6038	10	10

Received of the

SOUTHERN MINNESOTA JOINT STOCK LAND BANK

OF REDWOOD FALLS, MINNESOTA

STOCK CERTIFICATE

No. 7080 — For 50 Shares of Stock

Date Jan 23 1928

Signed J. S. BACHE & Co.

Permanent Address 42 Bway N Y City

Plaintiffs' Exhibit 3.

CHARLES ARMBRECHT
c/o J. S. Bache and Co., 42 Broadway, New York

When Issued	*Nos. of Ctfs.*		*From Whom Received*	*No. of Shares*	*Balance*
	Old	*New*			
1928					
Jan 20	3049	7079	J. S. Bache and Co.	50	
" "	3049	7080	" " " " "		
" "	6098	"	" " " " "		
" "	6038	"	" " " " "	50	100

Plaintiffs' Exhibit 4.

J. S. BACHE & CO. 2269

Dr. SOUTH MINNESOTA JT. STOCK LAND BANK Cr.

					May	*Dec*	*Jan*						*May*	*Dec*	*Jan*
					1932		*1933*						*1932*		*1933*
	1931	Oct	31	31	31	6		1931	Oct	31	31	31	6
								Box	# 1	100	100	100	X
J S Bache	Long a/c		100	100	100	X							
	Loan a/c					100 X							

83

Plaintiffs' Exhibit 5.

Plaintiffs' Exhibit 5 is a printed copy of the complaint in the action entitled George C. Holmberg, et al., Complainants against Annie Anchel, et al., Defendants, in the United States District Court, Southern District of New York. Annexed sheets as Schedule A are a list of stockholders as they appeared upon the records of the bank and the addresses, and the defendant Charles Armbrecht was listed "Care J. S. Bache & Co., 100 shares, par value $10,000."

Plaintiffs' Exhibit 6.

DEPARTMENT OF JUSTICE

UNITED STATES MARSHAL
SOUTHERN DISTRICT OF NEW YORK
United States Court House

New York City May 18, 1937

GEORGE C. HALMBERG

vs.

ANNIE ANCHEL, et al.

Mr. Franklin S. Wood
120 Broadway
New York City

Dear Sir:

Enclosed please find my check #4709, for the sum of $103.40, balance of your deposit in the above entitled action.

Yours truly,

JOHN J. KELLY
John J. Kelly
U. S. Marshal, SDNY.

LL
ENC.

Plaintiffs' Exhibit 7.

(*Envelope*)

C. Fried
1868 Harrison Ave.
Bronx, N. Y.
120 Bway

Mr. Charles Armbrecht
J S. Bache & Company
36 Wall Street
New York, N. Y.

(Postmarked on Envelope:)

Church St. Annex—May 5, 1942
Wall St. Station —May 6, 1942
—May 12, 1942

Return to sender
Not found with care 2nd trip 5-6-42 C3449

Registered Mail
Return Receipt Requested
Deliver to Addressee Only

Registered No. 314400

Plaintiffs' Exhibit 8.

Plaintiffs' Exhibit 8 is an affidavit of mailing the order permitting publication to the record stockholders of the bank in the action entitled George C. Holmberg, et al., Complainants against Southern Minnesota Joint Stock Land Bank of Minneapolis, et al., Defendants in the United States District Court, District of Minnesota, Fourth Division.

Plaintiffs' Exhibit 9.

October 19, 1935.

Mr. Charles Armbrecht,
c/o J. S. Bache & Co.,
42 Broadway,
New York City.

Dear Sir:

Your name appears upon the books of the Southern Minnesota Joint Stock Land Bank of Minneapolis as the record holder of 100 shares of its stock of the total par value of $10,000. The said Joint Stock Land Bank is now in receivership, and by decree of the United States District Court, dated April 20, 1935, a 100% assessment has been levied against all stockholders, together with interest from the date of the decree.

Enclosed herewith for your information is a copy of an extract from the decree of the Court and of the Findings of Fact and Conclusions of Law by the Court upon which the decree is based.

Demand is hereby made by me as counsel to the Receiver, Mr. Ervin J. Friede, for the immediate payment of the said sum of $10,000, with interest from April 20, 1935. In the event that payment is not made promptly, legal proceedings will be instituted against you to enforce the decree of the Court and collect the assessment, together with the costs and additional interest.

Very truly yours,

FSW:M
ENC.

Plaintiffs' Exhibit 10.

October 1, 1935

Mr. Charles Armbrecht
Armbrecht Lumber Company
79 Wall Street
New York, New York

Dear Mr. Armbrecht:

Your name appears upon the books of the Southern Minnesota Joint Stock Land Bank of Minneapolis as the record holder of one hundred shares of its stock of the total par value of $10,000. The said Joint Stock Land Bank is now in receivership, and by decree of the United States District Court, dated April 20, 1935, a 100% assessment has been levied against all stockholders, together with interest from the date of the decree.

Enclosed herewith for your information is a copy of an extract from the decree of the Court and of the Findings of Fact and Conclusions of Law by the Court upon which the decree is based.

Demand is hereby made by me as Counsel to the Receiver, Mr. Ervin J. Friede, for the immediate payment of the said sum of $10,000, with interest from April 20, 1935. In the event that payment is not made promptly, legal proceedings will be instituted against you to enforce the decree of the Court and collect the assessment, together with the costs and additional interest.

Very truly yours

FSW:LR
Encl.

Plaintiffs' Exhibit 11.

ARMBRECHT LUMBER COMPANY
YELLOW PINE LUMBER
818-20 First National Bank Annex

Eastern Office
Room 505 — 79 Wall St.
New York City
John R. Freal, Mgr.

Incorporated in Alabama

Mobile, Ala. October 8th, 1935.

Mr. Franklin S. Wood
120 Broadway
New York, New York

Dear Sir:

Your letter of October 1st, addressed "Mr. Charles Armbrecht Armbrecht Lumber Company, 79 Wall Street, New York, New York", was opened by the manager of our office in New York and forwarded to me here.

I am the only Charles Armbrecht connected with this Company, and my name is Charles H. Armbrecht. I have never bought, held, owned, or in any other way had stock in the Southern Minnesota Joint Stock Land Bank of Minneapolis, or any other Bank North of the Ohio River. I have never been advised of any transfer to me of stock in the Bank you mention or any other Bank. I knew absolutely nothing about any of the matters on which your letter is based, previous to the receipt of your letter. Now I know nothing about them except what you say in your letter.

I would suggest that as I have no connection what ever with this matter regardless of any records to the contrary,

Plaintiffs' Exhibit 11.

that caution be used in further handling so far as I am concerned.

My brother, Mr. William H. Armbrecht, of the Law Firm of Armbrecht, Twitty and Armbrecht of this city, will probably be in the office of Freihauf, Robinson, and Sloan, Attorneys, 60 Wall Street, New York, next week. After consulting him, I have given him a copy of your letter and a copy of this reply. If you desire to, you may communicate with him there.

Yours truly,

C. H. ARMBRECHT

CHA:hh

Defendants' Exhibit A.

Number 6098 Shares 10

Incorporated Under Federal Farm Loan Act

Under Supervision of Federal Farm Loan Board,
A Bureau of the United States Treasury

PAR VALUE $100

SOUTHERN MINNESOTA JOINT STOCK LAND BANK

OF REDWOOD FALLS, MINNESOTA

THIS CERTIFIES that J. S. BACHE & Co. is the owner of TEN Shares of the Capital Stock of SOUTHERN MINNESOTA JOINT STOCK LAND BANK of Redwood Falls, Minnesota transferable only on the books of this Corporation in person or by attorney upon surrender of this certificate properly endorsed.

IN WITNESS WHEREOF, the said Corporation has caused this certificate to be signed by its duly authorized officers and its Corporate Seal to be hereunto affixed at Redwood Falls, Minnesota, this Nineth (9) day of December, A. D. 1925.

W. B. SIMENT
Secretary

H. A. LEVITH
President

Defendants' Exhibit A.

(In Margin)

SOUTHERN MINNESOTA JOINT STOCK LAND BANK
of Redwood Falls, Minnesota

Certificate No. 6098

For ..... 10 ..... Shares

Issued to
J. S. Bache & Co. 42 Broadway, NYC
Dated Dec 9 1925

Transferred from Louis Wise

Dated 11/11/22

No. Original Certificate	*No. Original Shares*	*No. of Shares Transferred*
1887	10	10

(On Back)

CERTIFICATE
FOR
10 SHARES

SOUTHERN MINNESOTA JOINT STOCK LAND BANK
OF REDWOOD FALLS, MINN.

Issued to J. S. BACHE & Co.
Dated December 9, 1925.

FOR VALUE RECEIVED, ... hereby sell, assign and transfer unto CHAS. ARMBRECHT
Shares of the Capital Stock represented by the within Certificate and do hereby irrevocably constitute and appoint
..... Attorney
to transfer the said Stock on the books of the within named Corporation with full power of substitution in the premises.

Dated Jan 19 1926

In presence of J. S. BACHE & Co.

.....

Defendants' Exhibit A.

NOTICE. The signature of this assignment must correspond with the name as written upon the face of the certificate, in every particular, without alteration or enlargement or any change whatever.

TRANSFER REQUESTED

J. S. BACHE & Co.

Received of the

SOUTHERN MINNESOTA JOINT STOCK LAND BANK
New York Joint Stock Land Bank
61 Broadway, N. Y. C.

STOCK CERTIFICATE

No. 6098 — For 10 Shares of Stock
Dated 12/9/25

Signed J. S. BACHE & Co.
W. T. WATSON

We hereby certify that the transfer of the within shares to the names indicated by the star is made solely to complete a purchase made by us for our customer, and we have no ownership or interest therein.

J. S. BACHE & Co., 42 B'way, N. Y.

Defendants' Exhibit B.

Number 3049 Shares 80

Incorporated Under Federal Farm Loan Act

Under Supervision of Federal Farm Loan Board,
A Bureau of the United States Treasury

PAR VALUE $100

SOUTHERN MINNESOTA JOINT STOCK
LAND BANK

OF REDWOOD FALLS, MINNESOTA

THIS CERTIFIES that J. S. BACHE & Co. is the owner of EIGHTY Shares of the Capital Stock of SOUTHERN MINNESOTA JOINT STOCK LAND BANK of Redwood Falls, Minnesota transferable only on the books of this Corporation in person or by attorney upon surrender of this certificate properly endorsed.

IN WITNESS WHEREOF, the said Corporation has caused this certificate to be signed by its duly authorized officers and its Corporate Seal to be hereunto affixed at Redwood Falls, Minnesota, this 11th day of February A. D. 1924.

W. B. SIMENT
Secretary

G. W. GOLD
Vice President

Defendants' Exhibit B.

(*In Margin*)

SOUTHERN MINNESOTA JOINT STOCK LAND BANK
of Redwood Falls, Minnesota

Certificate No. 3049

For ..... 80 ..... Shares

Issued to
J. S. Bache & Co. N. Y.
Dated 2-11-24

Transferred from J. S. Bache & Co.

No. Original Certificate	*No. Original Shares*	*No. of Shares Transferred*
1945	100	80

Received of the
Southern Minnesota Joint Stock Land Bank
of Redwood Falls
Stock Certificate

No. 3049 — For 80 Shares of Stock
J. S. Bache & Co., 42 B'way, N. Y.

(*On Back*)

CERTIFICATE

FOR

80 SHARES

SOUTHERN MINNESOTA JOINT STOCK LAND BANK
OF REDWOOD FALLS, MINN.

Issued to J. S. Bache & Co.
Dated February 11, 1925

Defendants' Exhibit B.

FOR VALUE RECEIVED, ... hereby sell, assign and transfer unto CHAS. ARMBRECHT

Shares of the Capital Stock represented by the within Certificate and do hereby irrevocably constitute and appoint

..... Attorney

to transfer the said Stock on the books of the within named Corporation with full power of substitution in the premises.

Dated Jan 27 1925

J. S. BACHE & Co.

In presence of

.....

NOTICE. The signature of this assignment must correspond with the name as written upon the face of the Certificate, in every particular, without alteration or enlargement or any change whatever.

We hereby certify that the transfer of the within shares to the names indicated by the star is made solely to complete a purchase made by us for our customer, and we have no ownership or interest therein.

J. S. BACHE & Co., 42 B'way, N. Y.

Defendants' Exhibit C.

Number 6038 Shares 10

Incorporated Under Federal Farm Loan Act

Under Supervision of Federal Farm Loan Board,
A Bureau of the United States Treasury

PAR VALUE $100

SOUTHERN MINNESOTA JOINT STOCK LAND BANK

OF REDWOOD FALLS, MINNESOTA

THIS CERTIFIES that J. S. BACHE & Co. is the owner of TEN Shares of the Capital Stock of SOUTHERN MINNESOTA JOINT STOCK LAND BANK of Redwood Falls, Minnesota transferable only on the books of this Corporation in person or by attorney upon surrender of this certificate properly endorsed.

IN WITNESS WHEREOF, the said Corporation has caused this certificate to be signed by its duly authorized officers and its Corporate Seal to be hereunto affixed at Redwood Falls, Minnesota, this Seventeenth (17) day of November, A. D. 1925.

W. B. SIMENT
Secretary

H. A. LEVITH
President

Defendants' Exhibit C.

(*In Margin*)

SOUTHERN MINNESOTA JOINT STOCK LAND BANK
of Redwood Falls, Minnesota

Certificate No. 6038

For ..... 10 ..... Shares

Issued to
J. S. Bache & Co. 42 Broadway, N Y C
Dated Nov 17 1925

Tranferred from J. S. Bache & Co.
Dated 11/10/25

No. Original Certificate	*No. Original Shares*	*No. of Shares Transferred*
6009	20	10

(*On Back*)

CERTIFICATE
FOR
10 SHARES

SOUTHERN MINNESOTA JOINT STOCK LAND BANK
OF REDWOOD FALLS, MINN.
Issued to J. S. Bache & Co.
Dated November 17, 1925.

FOR VALUE RECEIVED, ... hereby sell, assign and transfer unto CHAS. AUMBRECHT c/o J. S. Bache & Co. ..... Shares of the Capital Stock represented by the within Certificate and do hereby irrevocably constitute and appoint ..... Attorney to transfer the said Stock on the books of the within named Corporation with full power of substitution in the premises.

Dated Jan 19 1926

In presence of ..... J. S. Bache & Co.

.....

Defendants' Exhibit C.

NOTICE. The signature of this assignment must correspond with the name as written upon the face of the certificate, in every particular, without alteration or enlargement or any change whatever.

TRANSFER REQUESTED

J. S. BACHE

Received of the
SOUTHERN MINNESOTA JOINT STOCK LAND BANK
New York Joint Stock Land Bank
61 Broadway, N. Y. C.

STOCK CERTIFICATE
No. 6038 — For 10 Shares of Stock

Signed J. S. Bache & Co.
H. CANN

We hereby certify that the transfer of the within shares to the names indicated by the star is made solely to complete a purchase made by us for our customer, and we have no ownership or interest therein.

J. S. Bache & Co., 42 B'way, N. Y.

Findings of Fact, Conclusions of Law and Opinion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

GEORGE C. HOLMBERG et al., Plaintiffs, against MAUDE D. DUMONT et al., Defendants.	Civ. 18-110
GEORGE C. HOLMBERG et al., Plaintiffs, against GILBERT MILLER et al., as Executors under the last will and testament of Jules S. Bache, deceased, and another, Defendants.	Civ. 23-247

OPINION

FRANKLIN S. WOOD, Esq., Attorney for Complainants, 120 Broadway, New York, N. Y. CLARENCE FRIED, Esq., of Counsel.

MESSRS. COOK, LEHMAN, GREENMAN, GOLDMARK & LOEB, Attorneys for defendants, 20 Pine Street, New York, N. Y. EDGAR M. SOUZA, Esq., of Counsel.

JOHN W. CLANCY, U. S. D. J.

CLANCY, D. J.

FINDINGS OF FACT

1. Plaintiffs were, on the second day of May, 1932, and still are creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis which was closed on that day and was insolvent with an excess of liabilities over assets greater than $3,000,000—more than the par value of all the issued stock. On that day the defendant Charles Armbrecht was the record owner of 100 shares of stock of the par value of $10,000 issued by that bank and Jules S. Bache, the testator of the defendant executors, was the beneficial owner of these 100 shares. The defendant Armbrecht had been employed by the firm of J. S. Bache & Co. for a period of fifty years up to the year 1933 when he was pensioned and thereafter called weekly at the office of J. S. Bache & Co. for his pension. Jules S. Bache was in 1931 and until his death in 1944 a member of the firm of J. S. Bache & Co.

2. The defendant Stern is a member of J. S. Bache & Co., who do now and did since before 1924 operate a brokerage business. Between 1924 and 1931 three certificates, aggregating 100 shares of the stock of the Land Bank were issued to and held in some capacity by J. S. Bache & Co. In 1931 these three certificates were delivered to the bank to have a transfer of the 100 shares represented thereby to Charles Armbrecht, whose address was c/o J. S. Bache & Co., effected and the stock issued to Armbrecht accordingly. The transfer was effected and two new certificates, each for fifty shares, were issued in the name of the defendant Armbrecht and sent to J. S. Bache & Co. as brokers. This firm carried among their accounts one for Jules S. Bache, an individual member of the firm and the certificates, the beneficial ownership of which was at all times in Jules S.

Bache, were credited to the long account of Jules S. Bache, the individual, between October, 1931 and January, 1933 and held by the firm as security for that account during that time. There is no evidence in the case that the firm of J. S. Bache & Co. acted in any other capacity than that of broker in procuring the issuance of the stock to Armbrecht in 1931 or as pledgee of the stock in maintaining a margin account for Jules S. Bache who owned it.

3. On August 23, 1932 a notice of the institution of an action to collect the sum for which he was liable as record owner of the stock was given defendant Armbrecht by mail. He was then an employee of J. S. Bache & Co. On October 19, 1935 a notice of his liability on the stock and demand for its payment was received by him in the mail.

4. From May 1932 until January, 1937 when the remittitur of the Circuit Court in *Holmberg* v. *Carr* was handed down and judgment entered accordingly, plaintiffs had reason to believe they owned no cause of action against the banks stockholders. The ancillary receiver of the bank's local credits had, on August 13, 1936, served defendant Armbrecht in an action then instituted by him. Armbrecht had defaulted in answer. A default judgment was not entered against him because it was reasonable to put in all the required proof against all of the defendants at one time and the decision in *Holmberg* v. *Carr* vitiated the entire action.

5. In an action against some local stockholders instituted by plaintiff in 1937 following the *Holmberg* v. *Carr* decision service was not effected on defendant Armbrecht, the United States Marshal certifying that he could not be found. One of the plaintiffs' attorneys in person during the summer of 1937 inquired of the superintendent of 2565 Marion Avenue, Bronx, New York City, at which address

it was said Armbrecht had been served in the Receiver's 1936 action, and was unable to find by his inquiries any new address for him. A process server was employed and was unable to locate Armbrecht for service. The case went to trial in May and June, 1938. Judgment was entered in January, 1939 and was affirmed in April, 1940.

6. In May, 1942 plaintiffs' attorneys who had, in December, 1941 or January, 1942 acquired information that Armbrecht was a former employee of J. S. Bache & Co. instituted suit against, among others, the partners in the firm of J. S. Bache & Co., Armbrecht and others but of the partners named served only Stern. This attorney sent a registered letter to Charles Armbrecht, c/o J. S. Bache & Co., 36 Wall Street, New York City, which was returned endorsed not found, even on a second visit. A process server swore to his service upon defendant Armbrecht at his son's home. An address from which Armbrecht had moved was eventually given to him by Stern's attorneys as a consideration for an extension of time for Stern to answer but a process server verified an affidavit of service on him at his son's home. In October, 1943 the alleged service of the summons on the defendant Armbrecht in this action was quashed, the motion therefor having been made in March. Immediately this action was instituted against Armbrecht and Jules S. Bache, the other defendants' testator.

7. The first action in which the summons against Armbrecht was quashed for failure to serve and this action were consolidated. The defendant Armbrecht is well now on to being a nonagenarian and the defendants' testator Bache died March 24, 1944. The firm of J. S. Bache & Co. has destroyed its records for the period before 1935.

8. The plaintiffs have not been guilty of laches.

CONCLUSIONS OF LAW.

1. The complaint is dismissed as against the defendant Stern. *Pufabal* v. *Fidelity Nat'l Bank*, 40 Fed. (2d) 25.

2. Plaintiffs are entitled to judgment against Charles Armbrecht and the executors of Jules S. Bache, with costs, the defendant executors to be primarily liable and the defendant Armbrecht secondarily liable as between themselves.

* * * * * *

The form of action which has been determined to be proper form for recovery of liability declared in the statute 12 U. S. C. A. 812, is a bill in equity (*Wheeler* v. *Green*, 280 U. S. 49) to be brought by the creditors (*Holmberg* v. *Carr*, 86 Fed. (2) 727). Therefore the state statute of limitations is not recognized law in this court. *Russell* v. *Todd*, 309 U. S. 280; *York* v. *Guaranty Trust Co.*, 143 Fed. (2) 503. The liability of the statute is intended to afflict every shareholder but is enforcible only where each resides and since their wide geographical distribution is normally to affect the remedy would certainly not work out equally and ratably but inequitably as between themselves if the several stockholders found each a shield in his state's statute of limitations.

The tortuous progress of the plaintiffs and their attorneys through the numerous difficulties which the history of their pursuit of these defendants reveals was necessarily slow and the criticism of their acts as lending itself to a charge of laches could find favor only if the defendants were prejudiced by a failure of due expedition. We do not sustain the charge that expedition was lacking. As we see it they did everything that is ordinarily done to locate a prospective defendant. But even assuming that they were slow their conduct neither caused nor occasioned any prejudice to the defendants. It has been asserted that the de-

struction of the Bache firm's records made it impossible to prove something or other; just what was not made clear. But that Armbrecht was the real owner of the stock in May 1932 is not disputed and that Bache was the beneficial owner is admitted, so what happened to the certificate before or since or why Bache put the stock in Armbrecht's name is immaterial. Bache's death was fortuitous. He had already admitted his beneficial ownership in the stock. He had ample time to prepare for trial if any issue were to be disputed. Furthermore, when Bache used Armbrecht as a dummy to suit his own purpose he forsook any claim to later injury for failure to recognize him as a defendant earlier and that claim now comes with bad grace.

Neither has Armbrecht any reason to complain of laches. His answer, "I don't remember" when asked if he ever knew of the issuance of the shares of stock to him is certainly wholly insufficient to raise any equity in his favor and we do not conclude as his attorney does that this means his memory is presently worse than it was ten years ago.

The answer on his examination meant he had no explanation of the fact. He knew the assertion of his liability since shortly after it accrued and did nothing to meet it nor did he repudiate his imputed ownership. Whether or not he communicated this news to Bache or any of his partners then does not appear. That he did nothing to meet his alleged liability or to pass it to the shoulders of the beneficial owner, even though that owner was in some sense his patron indicates if anything that he willingly lent himself to Bache's escape. The delay has not changed his position nor prejudiced him in any respect.

Dated: New York, N. Y., November 1, 1944.

JOHN W. CLANCY,
United States District Judge.

Judgment.

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

GEORGE C. HOLMBERG, FRANK C. BALL, CARL J. EASTERBERG, GEORGE F. HARDIE and PAT B. MORRIS on behalf of themselves and all other creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis,

Complainants,

against

MAUDE D. DUMONT, NEHEMIAH FREEDMAN, CHARLES ARMBRECHT and J. S. BACHE, HAROLD L. BACHE, MORTON F. STERN, ARTHUR F. BRODERICK, WILLIAM REID, WALTER F. SCHULTZE, HUGO J. LION, CHARLES A. COREY, SAMUEL J. SMITH, GEORGE WEISS and CLIFFORD W. MICHEL, co-partners doing business under the style and name of J. S. BACHE & COMPANY,

Defendants.

Civ. 18-110.

GEORGE C. HOLMBERG, FRANK C. BALL, CARL J. EASTERBERG, GEORGE F. HARDIE and PAT B. MORRIS on behalf of themselves and all other creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis,

Complainants,

against

CHARLES ARMBRECHT, GILBERT MILLER, BARBARA RICHARDS MICHEL, MURIEL RICHARDS PERSHING and DOROTHY RICHARDS HIRSHON, as Executors under the Last Will and Testament of Jules S. Bache, deceased.

Defendants.

Civ. 23-247.

These consolidated causes came on to be heard on the 10th and 16th days of October, 1944, both parties appear-

ing by counsel, and the issues having been duly tried and the evidence of all parties having been duly submitted and heard and having been duly argued by counsel and this court having made written findings of facts and conclusions of law, after due deliberation, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. The complainants George C. Holmberg, Frank C. Ball, Carl J. Easterberg, George F. Hardie and Pat G. Morris on behalf of themselves and all other creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis are entitled to judgment against Gilbert Miller, Barbara Richards Michel, Muriel Richards Pershing and Dorothy Richards Hirshon, as executors under the Last Will and Testament of Jules S. Bache, deceased, and against Charles Armbrecht in the amount of $10,000 together with costs and disbursements in the amount of $45.06, as taxed, making a total of $10,045.06.

2. As between the defendant Charles Armbrecht and the defendants Gilbert Miller, Barbara Richards Michel, Muriel Richards Pershing and Dorothy Richards Hirshon, as executors of the Last Will and Testament of Jules S. Bache, deceased, the defendant Charles Armbrecht shall be secondarily liable and the defendants Gilbert Miller, Barbara Richards Michel, Muriel Richards Pershing and Dorothy Richards Hirshon, as executors of the Will of Jules S. Bache, deceased, shall be primarily liable.

3. The suit Civil 18-110 be dismissed with costs and disbursements of $45.06 as taxed, as against the defendant Morton F. Stern as a co-partner doing business under the style and name of J. S. Bache & Company.

4. The monies collected in this suit constitute a fund to be administered by this court as a court of equity for the

equal benefit of all creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis as this court may hereafter determine and this court reserves jurisdiction as to all matters concerning the administration, application and distribution of such funds and the payment of counsel fees and expenses in the present suit.

Approved, November 9th, 1944.

JOHN W. CLANCY,
U. S. D. J.

Judgment rendered November 10th, 1944.

GEORGE J. H. FOLLMER, JR.,
Clerk.

Notice of Appeal.

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

GEORGE C. HOLMBERG, et al., Complainants, against GILBERT MILLER, et al., Defendants.	Civ. 23-247.

Sirs:

NOTICE IS HEREBY given that the defendants Gilbert Miller, Barbara Richards Michel, Muriel Richards Pershing and Dorothy Richards Hirshon, as Executors under

the Last Will and Testament of Jules S. Bache, deceased, and defendant Charles Armbrecht hereby appeal to the Circuit Court of Appeals, Second Circuit, from each and every part of the joint final judgment entered in the Clerk's Office of the United States District Court, Southern District of New York on November 10, 1944, in Civil Action 18-110 and Civil Action 23-247, except so much thereof as dismisses the complaint in Civil Action 18-110 against Morton F. Stern, a co-partner of the firm of J. S. Bache & Co.

Dated, New York, November 21, 1944.

Yours, etc.,

COOK, LEHMAN, GREENMAN, GOLDMARK & LOEB,
Attorneys for Defendants Gilbert Miller, et al., as Executors, etc., and Charles Armbrecht,
Office and P. O. Address,
No. 20 Pine Street,
Borough of Manhattan,
New York 5, N. Y.

To:

GEORGE H. J. FOLLMER, Esq.,
Clerk of the United States District Court,
Southern District of New York.

FRANKLIN S. WOOD, Esq.,
Attorney for Plaintiffs,
20 Exchange Place,
New York, N. Y.

Order Amending Finding No. 6.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

GEORGE C. HOLMBERG, et al., Plaintiffs, against MAUDE D. DUMONT, et al., Defendants.	Civ. 18-110.
GEORGE C. HOLMBERG, et al., Plaintiffs, against GILBERT MILLER, et al., as Executors under the Last Will and Testament of Jules S. Bache, deceased, and another, Defendants.	Civ. 23-247.

The defendants Gilbert Miller, Barbara Richards Michel, Muriel Richards Pershing and Dorothy Richards Hirshon, as Executors under the Last Will and Testament of Jules S. Bache, deceased, and Charles Armbrecht, having moved this Court for an order amending the findings of fact and conclusions of law, and making new and additional findings of fact and conclusions of law, having come on to be heard, now upon reading the notice of motion dated November 20, 1944, the affidavit of Edgar M. Souza verified November 20, 1944, and after hearing Edgar M. Souza, of Counsel for said defendants, in support of said motion, and Clarence Fried, of Counsel for plaintiff, in opposition thereto, it is,

On motion of Cook, Lehman, Greenman, Goldmark & Loeb, attorneys for defendants,

ORDERED, that finding of fact "6" be amended so that the same shall read as follows:

"6. In May, 1942 plaintiffs' attorney who had, in December 1941 or January 1942, acquired information that Armbrecht was a former employee of J. S. Bache & Co., instituted suit against, among others, the partners in the firm of J. S. Bache & Co., Armbrecht and others but of the partners named served only Stern. This attorney sent a registered letter to Charles Armbrecht, c/o J. S. Bache & Co., 36 Wall Street, New York City, which was returned endorsed not found, even on a second visit. A process server swore to his service upon defendant Armbrecht at his son's home. An address from which Armbrecht had moved was eventually given to him by Stern's attorneys as a consideration for an extension of time for Stern to answer but a process server verified an affidavit of service on him at his son's home. In October, 1943 the alleged service of the summons on the defendant Armbrecht in this action was quashed, the motion therefor having been made in March. Immediately this action was instituted against Armbrecht and Jules S. Bache, the other defendants' testator."

And in all other respects said motion is hereby denied.

Dated, New York, December 7th, 1944.

JOHN W. CLANCY, *U. S. D. J.*

Form of order approved. Notice of settlement is hereby waived.

(Sgd.) FRANKLIN S. WOOD,
Attorney for Plaintiffs.

Stipulation as to Record.

DISTRICT COURT OF THE UNITED STATES

For the Southern District of New York

George C. Holmberg, et al.,
Plaintiffs,

against

Gilbert Miller, et al.,
Defendants.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled action, as agreed upon by the parties.

Dated, New York, N. Y., February 15, 1945.

Franklin S. Wood,
Attorney for Plaintiffs-Appellees.

Cook, Lehman, Goldmark & Löeb,
Attorneys for Defendants-Appellants.

Clerk's Certificate.

UNITED STATES OF AMERICA,

SOUTHERN DISTRICT OF NEW YORK.

GEORGE C. HOLMBERG, et al.,
Plaintiffs,

vs.

GILBERT MILLER, et al.,
Defendants.

I, GEORGE J. H. FOLLMER, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District in the above-entitled matter as agreed upon by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 13th day of March in the year of our Lord one thousand nine hundred and forty-five and of the Independence of the said United States the one hundred and sixty-ninth.

GEORGE J. H. FOLLMER,
Clerk.

(Seal)

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 305—October Term, 1944

(Argued April 13, 1945 Decided July 13, 1945)

GEORGE C. HOLMBERG, *et al.*,
Plaintiffs-Appellees,
—*v.*—
CHARLES ARMBRECHT, *et al.*,
Defendants-Appellants.

Before:

SWAN, AUGUSTUS N. HAND and CLARK,
Circuit Judges.

Appeal from the District Court of the United States for the Southern District of New York.

Action by George C. Holmberg and four others, on behalf of themselves and all other creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis, against Charles Armbrecht and Jules S. Bache to recover an assessment upon stock of said bank under 12 U. S. C. A. §812, wherein Gilbert Miller and three others, executors under the will of Jules S. Bache, were substituted for said Bache, deceased. From a judgment for plaintiffs, defendants appeal. Reversed.

EDGAR M. SOUZA, of New York City (Cook, Lehman, Goldmark & Loeb, all of New York City, on the brief), for defendants-appellants.

CLARENCE FRIED, of New York City (Franklin S. Wood, of New York City, on the brief), for plaintiffs-appellees.

CLARK, *Circuit Judge*:

This appeal presents the interesting question of the applicability of a state statute of limitations to a federally created equitable right. The District Court held that as to "a bill in equity" "the state statute of limitations is not recognized law in this court," citing *Russell* v. *Todd*, 309 U. S. 280, and *York* v. *Guaranty Trust Co.*, 2 Cir., 143 F. 2d 503. Decision of this appeal was delayed to await the Supreme Court's review of the latter case; and upon its reversal by *Guaranty Trust Co.* v. *York*, 65 S. Ct. , June 18, 1945, the parties herein, with permission of the court, filed supplemental briefs discussing the effect of that most recent precedent. Defendants argue that it is substantially controlling, while plaintiffs contend that it is applicable only to state-created rights enforced under the diversity-of-citizenship jurisdiction of the federal court.

The present action, brought by creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis to recover an assessment of 100 per cent on the par value of stock of the bank under §16 of the Federal Farm Loan Act, 12 U. S. C. A. §812, was instituted in November, 1943, against Charles Armbrecht, as owner of record, and Jules S. Bache, as beneficial owner, of 100 shares of the bank's stock. Plaintiffs rested federal jurisdiction both on the statute and on the diverse citizenship of the parties. This action represented the culmination of a series of legal moves to recover from the stockholders an amount equal to the par value of their stock following the closing of the bank

May 2, 1932, in a completely insolvent condition. In an action instituted by these plaintiffs on July 28, 1932, the District Court for the District of Minnesota appointed a receiver for the collection of these assessments. *Holmberg* v. *Southern Minnesota Joint Stock Lank Bank of Minneapolis*, D. C. Minn., 10 F. Supp. 795; *cf. Holmberg* v. *Anchell*, D. C. S. D. N. Y., 24 F. Supp. 594, affirmed *Holmberg* v. *Merrick*, 2 Cir., 110 F. 2d 1022. Thereafter the receiver, usually obtaining ancillary appointment, brought actions to effect such collection in several state and federal jurisdictions until it became settled that the only method of enforcement of the statutory liability was through an equitable class action brought on behalf of bank creditors. *Holmberg* v. *Carr*, 2 Cir., 86 F. 2d 727, Dec. 7, 1936; *Christopher* v. *Brusselback*, 302 U. S. 500, Jan. 3, 1938. In one of the actions which thus failed, defendant Armbrecht was named as a party and was served with process in New York City on August 13, 1936.

On May 2, 1942, to avoid any possible effects of the New York statute of limitations, the plaintiffs instituted an action to recover on this stock against various defendants, including Armbrecht, not served in *Holmberg* v. *Anchell*, *supra*, and joined as defendants the partners doing business as J. S. Bache & Company. But the only defendant served was Morton F. Stern, a partner of the firm.[1] At a pre-trial examination he testified that J. S. Bache & Company had no interest in the stock and that at the time of the bank's failure Jules S. Bache was the beneficial owner. Thirteen

[1] Defendant Armbrecht on March 24, 1943, moved to quash service claimed to have been made upon him, and the District Court granted his motion on October 28, 1943. Thereafter this action was treated as consolidated with the present action, and they were tried together; but the court found that the partnership had no interest in the stock, and dismissed the earlier action as against Stern. No appeal was taken from this dismissal.

months thereafter and eleven and one-half years after the bank's failure, this action was commenced against Bache and Armbrecht. Defendants pleaded as affirmative defenses laches and the New York ten-year statute of limitations, N. Y. Civil Practice Act, §53, applicable when no other limitation is specifically prescribed. The District Court having granted recovery for the $10,000 sought, the validity of these affirmative defenses constitutes the sole issue on this appeal.

In denying the defense of laches, the District Court relied on the prior history of these proceedings and agreed with plaintiffs' contention that defendant Bache was guilty of inequitable conduct by placing the stock in the name of Armbrecht in order to avoid possible double liability and by not disclosing the true identity of Armbrecht or his whereabouts so as to make proper service possible. The court also accepted the view that the Bache action could not have been brought before Stern's examination disclosed the identity of the beneficial owner of the stock. Defendants, however, contend that these are conclusions from admitted facts, rather than factual findings, and that they are erroneous, pointing out that the stock was placed in Armbrecht's name long before insolvency, on January 20, 1928 (the District Court's finding that this was done in 1931 is obviously an error, as the documentary records show); that placing stock in the name of a nominee is an old Wall Street custom in no way forbidden by law; that plaintiffs knew of the correct legal procedure as early as 1936, and with reasonable diligence could have discovered and served Armbrecht, who lived throughout the period in the Bronx in New York City, instead of relying upon some process-server's assertion that he could not be found; and that either such an action against Armbrecht or inquiry at the Bache Company would have disclosed at once the interest of Jules

S. Bache in the stock, which was not concealed. Decision of these matters and a fuller recital of the facts bearing upon them become unnecessary, however, in view of our conclusion that the rationale of the *York* case requires the application of the New York statute to this action.

For decision of our problem we must examine both the *York* case and the earlier case which it expounds, namely, *Russell* v. *Todd*. The latter was an action identical with ours here, for a stock assessment under this same provision of the Federal Farm Loan Act. The Court, finding such liability enforceable only by a single representative suit in equity, held inapplicable the New York three-year statute of limitations governing actions against directors or stockholders of banking associations, N. Y. Civil Practice Act, §49, par. 4, citing state decisions holding this provision inapplicable to purely equitable remedies. It did not have occasion to pass on the ten-year statute (the action there being brought three years and eight months after it accrued), which under state decisions unquestionably affects all forms of equity suits. *Equity Corporation* v. *Groves*, 294 N. Y. 8, 60 N. E. 2d 19; *Ford* v. *Clendenin*, 215 N. Y. 10, 16, 109 N. E. 124, Ann. Cas. 1917A 658; *Gilmore* v. *Ham*, 142 N. Y. 1, 6, 36 N. E. 826, 40 Am. St. Rep. 554; *Mencher* v. *Richards*, 256 App. Div. 280, 282, 9 N. Y. S. 2d 990. In fact it answered the claim that under New York law laches was not a defense and that in the light of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 114 A. L. R. 1487, and *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202, federal courts "are no longer free to apply a different rule" in the exercise of their statutory equitable jurisdiction by saying, 309 U. S. at page 294: "But in this case laches has not been held to be a defense and the Court has not declined to give effect to a state statute shown to be applicable. In the circumstances we have no occasion to consider the extent to which federal

courts, in the exercise of the authority conferred upon them by Congress to administer equitable remedies, are bound to follow state statutes and decisions affecting those remedies."

The opinion in the *York* case begins by quoting this reservation of the *Todd* case and then says, "The question thus carefully left open in *Russell* v. *Todd* is now before us." And the Court thereupon decides that recovery in a federal court must be barred by a state statute of limitations if recovery in a state court will be thus barred. True, the Court carefully limits its decisions to diversity cases, saying, "We put to one side the considerations relevant in disposing of questions that arise when a federal court is adjudicating a claim based on a federal law," citing cases under the rubric "for instance." This express reservation is the foundation of the plaintiffs' present contention herein, but we think they push it beyond what the Court intended. The cases cited were *Board of Com'rs* v. *United States*, 308 U. S. 343; *Deitrick* v. *Greaney*, 309 U. S. 190; *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363; *O'Brien* v. *Western Union Telegraph Co.*, 1 Cir., 113 F. 2d 539. These cases, based on federal enactments, state no more than the obvious principle that a rule of state law will be disregarded by a federal court when inconsistent with the federal statute governing the case before it. Hence where the federal statute contains its own period of limitation—e.g., as in the Federal Employers' Liability Act, 45 U. S. C. A. §56—the state law must necessarily yield. But as the Court pointed out in the *Todd* case, 309 U. S. 280, 293, "in the absence of a controlling act of Congress federal courts of equity, in enforcing rights arising under statutes of the United States, will * * * adopt and apply local statutes of limitations which are applied to like causes of action by the state courts." So here, where there is an applicable state statute, we should

give it effect, particularly now that the *York* case has admonished us not to create differences between law and equity actions when the state courts have none.

Plaintiffs, however, stress a footnote to *Russell* v. *Todd*, 309 U. S. 280, 288, where the Court, in giving an historical résumé of federal precedents, pointed out that federal courts of equity had not considered themselves obligated to apply local statutes of limitations when they conflicted with equitable principles, "as where they apply, irrespective of the plaintiff's ignorance of his rights because of the fraud or inequitable conduct of the defendant." From its setting in a footnote and its context, this appeared to be intended as a statement of historical background, rather than present law; and this was emphasized by the Court's caveat at the end of its decision, quoted above. That this was actually the Court's meaning seems now demonstrated both by the discussion in the *York* case and by what has happened to the precedents cited. The ones really directly on the point urged by plaintiffs are *Kirby* v. *Lake Shore & M. S. R. Co.*, 120 U. S. 130, and *Stevens* v. *Grand Central Mining Co.*, 8 Cir., 133 F. 28, and *Johnson* v. *White*, 8 Cir., 39 F. 2d 793, 798, both based on the *Kirby* case. But the *Kirby* case was overruled by the *York* case, the Supreme Court stating that "nothing that was decided, unless it be the *Kirby* case, needs to be rejected." Consequently any limitation based on the *Kirby* case that might be read into the *Todd* case was also rejected.

The *York* case indeed went further than this. The essence of its holding is that limitations go to the substantive rights of the parties, which ought not to vary with the remedy; and hence there should be no distinction in limitation periods in diversity cases between those arising under the federal court's equity powers and those arising in law, provided the respective state statutes and decisions make

no such distinction. And no sound reason is offered why such a distinction should be made when, as here, the right sought to be enforced is created by a federal statute. In enforcing legal rights under a federal statute, state limitation statutes have always been applied, as in proceedings to enforce private rights under the antitrust laws, *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U. S. 390; Holmes, *J.*; *cf. Momand* v. *Universal Film Exchange*, D. C. Mass., 43 F. Supp. 996, 1008, Wyzanski, *J.*; *Hanson Packing Co.* v. *Swift & Co.*, D. C. S. D. N. Y., 27 F. Supp. 364, Galston, *J.*, or for the infringement of patents, *Campbell* v. *City of Haverhill*, 155 U. S. 609, or for the statutory liability of a shareholder in a national bank, *McDonald* v. *Thompson*, 184 U. S. 71; *Rawlings* v. *Ray*, 312 U. S. 96. It would be anomalous, indeed, to hold rights under these important federal laws strictly subject to state limitations, and at the same time to permit the most extreme variation in the bar period for actions to enforce the statutory liability of a shareholder in a federal land bank. Such a divergence in treatment is opposed not only to common sense, but also to the clear implications of the *York* case. For that case quoted with approval the following statement from the dissenting opinion of Judge A. N. Hand, below: "In my opinion it would be a mischievous practice to disregard state statutes of limitations whenever federal courts think that the result of adopting them may be inequitable. Such procedure would promote the choice of United States rather than of state courts in order to gain the advantage of different laws." *York* v. *Guaranty Trust Co.*, 2 Cir., 143 F. 2d 503, 531.

This principle is true here as in diversity cases. For the assessment authorized by this statute is enforceable in state courts. See *Friede* v. *Jennings*, 121 Conn. 220, 184 A. 369; *Friede* v. *Sprout*, 294 Mass. 512, 2 N. E. 2d 549; *In re*

Christopher's Estate, Ohio App., 35 N. E. 2d 454. As we have already pointed out, the New York courts in such a proceeding would naturally apply the ten-year statute, just as Ohio applied its probate statute of nonclaim in the case last cited. To permit a different treatment in the federal courts would therefore constitute an undesirable inroad on the practical policy of uniformity embodied in *Erie R. Co.* v. *Tompkins*, *supra*, to the same extent as the permission of such variation would have been in the *York* case. Thus the ten-year statute must apply absolutely, and plaintiffs' claim is therefore barred. This in fact was the result reached by the Eighth Circuit in the quite similar case of *Ball* v. *Gibbs*, 118 F. 2d 958. See also *Roos* v. *Texas Co.*, 5 Cir., 126 F. 2d 767; *Overfield* v. *Pennroad Corp.*, 3 Cir., 146 2d 889.

Reversed for judgment for defendants.

UNITED STATES CIRCUIT COURT OF APPEALS
Second Circuit

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 13th day of July, one thousand nine hundred and forty-five.

Present:

Hon Thomas W. Swann, Hon. Augustus N. Hand, Hon. Charles E. Clark, *Circuit Judges.*

George C. Holmberg, et al, Plaintiffs-Appellees,

v.

Charles Armbrecht, et al., Defendants-Appellants.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[Endorsed: United States Circuit Court of Appeals, Second Circuit. George C. Holmberg, et al., v. Charles Armbrecht, et al. Order for Mandate. United States Circuit Court of Appeals: Second Circuit, Filed July 13, 1945. Alexander M. Bell, Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 19, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

Endorsed on Cover: File No. 50208, U. S. Circuit Court of Appeals, Second Circuit. Term No. 5051. George C. Holmberg, Frank C. Ball, Carl J. Easterberg, et al., on Behalf of Themselves and all Other Creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis, Petitioners, vs. Charles Armbrecht and Gilbert Miller, Barbara Richards Michel, et al., as Executors Under the Last Will and Testament of Jules S. Bache, Deceased. Petition for writ of certiorari and exhibit thereto. Filed October 12, 1945. Term No. 505 O. T. 1945.

FILE COPY

Supreme Court of the United States

October Term, 1945.

No. 505

GEORGE C. HOLMBERG, FRANK C. BALL, CARL J. EASTERBERG, GEORGE F. HARDIE and PAT B. MORRIS, on behalf of themselves and all other creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis,

Petitioners and Appellees below,

vs.

CHARLES ARMBRECHT and GILBERT MILLER, BARBARA RICHARDS MICHEL, MURIEL RICHARDS PERSHING and DOROTHY RICHARDS HIRSHON, as Executors under the Last Will and Testament of JULES S. BACHE, deceased,

Respondents and Appellants below.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit and Brief in Support Thereof.

EDMUND BURKE, JR.,
Counsel for Petitioners.

FRANKLIN S. WOOD.
CLARENCE FRIED,
Of Counsel.

INDEX.

	PAGE
Petition for Writ of Certiorari	1
Summary Statement of the Matter Involved	1
Reasons Relied on for Allowance of Writ	3
Prayer for Writ	3
Brief in Support of Petition	4
Opinions of Court Below	4
Grounds of Jurisdiction of the Supreme Court	5
Statement of the Case	5
Specification of Errors	5
Questions Presented	6
Summary of Argument	6
Argument	6
POINT I	6
POINT II	8
CONCLUSION	11

STATUTES CITED.

PAGE

12 U. S. C. A. 812 5
28 U. S. C. A. 347 5

CASES CITED.

Abraham v. Ordway, 138 U. S. 416 9

Ball v. Gibbs, 118 Fed. (2d) 958 9
Benedict v. City of New York, 250 U. S. 321 9
Brusselback v. Cago, 85 Fed. (2d) 20 7

Christopher v. Brusselback, 302 U. S. 500 ..... 7, 10

Erie v. Tompkins, 304 U. S. 64 7

Friede v. Jennings, 121 Conn. 220, 184 A. 364 10
Friede v. Sprout, 294 Mass. 512, 2 N. E. (2d) 549 10

Garvey v. Wilder, 121 Fed. (2d) 714, 715 8
Guaranty Trust Company of New York v. Grace W. York, U. S. Supreme Court, decided June 18, 1945 ..... 2, 6, 7, 8, 11

Holmberg v. Anchell, 24 Fed. Supp. 594, 603 7
Holmberg v. Carr, 86 Fed. (2d) 727 ..... 7, 10

Kirby v. Lake Shore, 120 U. S. 130 9

Momand v. Universal Film Exchange, 43 Fed. Supp. 996, 1010 8

Ruhlin v. New York Life Insurance Co., 304 U. S. 202 7
Russell v. Todd, 309 U. S. 280 ..... 7, 8

St. Louis v. Spiller, 14 Fed. (2d) 288, affirmed 274 U. S. 304 9
Southern Pacific v. Bogert, 250 U. S. 483, 488-490.. 9

Wheeler v. Green, 280 U. S. 49 6
Wyman v. Wallace, 201 U. S. 230 5

Supreme Court of the United States

OCTOBER TERM, 1945.

No. .....

GEORGE C. HOLMBERG, FRANK C. BALL, CARL J. EASTERBERG, GEORGE F. HARDIE and PAT B. MORRIS, on behalf of themselves and all other creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis,
Petitioners and Appellees below,

vs.

CHARLES ARMBRECHT and GILBERT MILLER, BARBARA RICHARDS MICHEL, MURIEL RICHARDS PERSHING and DOROTHY RICHARDS HIRSHON, as Executors under the Last Will and Testament of JULES S. BACHE, deceased,
Respondents and Appellants below.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit and Brief in Support Thereof.

To the Honorable Harlan F. Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

I.

Summary Statement of the Matter Involved.

This is a suit in equity brought in the United States District Court for the Southern District of New York by petitioners herein against the respondents to assess and

collect the statutory liability created by a federal statute (12 U. S. C. A. 812) in favor of creditors of a joint stock land bank and imposed upon stockholders thereof equally and ratably but not to exceed 100% of their stockholdings. The respondent Charles Armbrecht was the record owner of 100 shares of stock of the Southern Minnesota Joint Stock Land Bank of Minneapolis (R. 20). The remaining respondents are the executors of the Estate of Jules S. Bache, deceased, who was the real owner of the stock registered in Charles Armbrecht's name (R. 19). Said Charles Armbrecht was a former employee of J. S. Bache & Co. of which firm the deceased defendant Jules S. Bach was a partner (R. 22). Charles Armbrecht never had $10,000 and could never respond to a judgment in the sum of $10,000 (R. 32). The trial was by court without a jury and a judgment was rendered by the trial court in favor of petitioners and against the defendants for the sum of $10,000. The trial court found as a fact that plaintiffs were not guilty of laches that Charles Armbrecht was used as a dummy by Bache and that defendants were guilty of inequitable conduct and therefore laches could not be invoked by defendants who were in hiding until they were discovered by plaintiff (R. 104). Appeal from said judgment was taken by the respondents to the United States Circuit Court of Appeals for the Second Circuit which reversed the decree of the District Court on the authority of *Guaranty Trust Company of New York* v. *Grace W. York*, decided by this court on June 18, 1945 (R. 117). The principal questions involved on said appeal were the rule of laches as applied in the federal courts, the applicability of the New York State statute of limitations and the effect of this court's decision in the case of *Guaranty Trust Company of New York* v. *Grace W. York*. The Circuit Court of Appeals reversed the decree of the trial court solely as a matter of law on the ground that the New York State statute of limitations was absolutely binding upon the federal court (R. 113-121).

II.

Reasons Relied on for the Allowance of the Writ.

1. The decision of the said Circuit Court of Appeals as to the binding effect of the New York State statute of limitations despite the fact that right to levy and collect the assessment is created by federal statute is an erroneous decision of an important question of general law and will vitally affect rights created by federal statutes.

2. The holding of the said Circuit Court of Appeals as to the binding effect of the New York State statute of limitations with respect to a right created by federal statute is a decision of a federal question in a way probably in conflict with applicable decisions of this court.

III.

Your petitioners present to this court, and file herewith as an exhibit hereto, a duly certified transcript of the entire record in the case, as the same appears in the United States Circuit Court of Appeals.

WHEREFORE, your petitioners pray that a writ of certiorari issue under the seal of this court, directed to the Circuit Court of Appeals for the Second Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Circuit Court in the case numbered and entitled on its docket No. 19734, *George C. Holmberg et al., Appellants* v. *Charles Armbrecht, et al., Appellees*, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court be reversed by the court, and for such further relief as to this court may seem proper.

Dated: New York, New York, October 11, 1945.

EDMUND BURKE, JR.,
Counsel for Petitioners.

FRANKLIN S. WOOD,
CLARENCE FRIED,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1945.

No. .....

GEORGE C. HOLMBERG, FRANK C. BALL, CARL J. EASTERBERG, GEORGE F. HARDIE and PAT B. MORRIS, on behalf of themselves and all other creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis,
Petitioners and Appellees below.

vs.

CHARLES ARMBRECHT and GILBERT MILLER, BARBARA RICHARDS MICHEL, MURIEL RICHARDS PERSHING and DOROTHY RICHARDS HIRSHON, as Executors under the Last Will and Testament of JULES S. BACHE, deceased,
Respondents and Appellants below.

Brief in Support of Petition for Writ of Certiorari.

I.

Opinions of Court Below.

The opinion of the District Court was rendered on November 1, 1944 (R. 99). The opinion of the Circuit Court of Appeals was rendered on July 13, 1945 (R. 112). Official citation is not yet available.

II.

Grounds of Jurisdiction of the Supreme Court.

1. The date of the judgment to be reviewed is July 13, 1945 (R. 122).

2. The statutory provision which is believed to sustain the jurisdiction of the court is 28 U. S. C. A. 347.

3. The cause of action asserted by petitioners as creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis, is created by a federal statute (12 U. S. C. A. 812) and the ruling by the Circuit Court that this cause of action is governed by a state statute of limitations is a decision of a federal question which vitally affects all rights created by federal statutes and is probably in conflict with the decisions of this court and the questions involved are substantial.

4. The case believed to sustain said jurisdiction is as follows: *Wyman* v. *Wallace*, 201 U. S. 230.

III.

Statement of the Case.

This has already been stated in the preceding petition under I (pp. 1-2) which is hereby adopted and made part of this brief.

IV.

Specification of Errors.

1. The Circuit Court of Appeals erred in holding that this action was governed by the New York State statute of limitations.

2. The Circuit Court of Appeals erred in unwarrantedly extending the rule enunciated by this court in *Guaranty Trust Company of New York* v. *Grace W. York*, decided June 18, 1945.

V.

Questions Presented.

1. Is a federal court sitting in equity in a case based upon a federal statute bound by a state statute of limitations or governed by the rule of laches?

2. Where the District Court has found that defendants are guilty of inequitable conduct by hiding behind a fictitious record owner of stock in a joint stock land bank, can laches be invoked by such defendants until they are found?

VI.

Summary of Argument.

1. This action is not governed by any state statute of limitations because it is based upon a right created by a federal statute and is solely cognizable in equity.

2. The construction by the Circuit Court of the decision of this court in the case of *Guaranty Trust Company of New York* v. *Grace York*, decided June 18, 1945 is an unwarranted extension of the rule expressed therein.

VII.

Argument.

POINT I.

The action is one solely enforceable in equity and there is no concurrent remedy of law. *Wheeler* v. *Green*,

280 U. S. 49; *Brusselback* v. *Cago*, 85 Fed. (2d) 20; *Holmberg* v. *Carr*, 86 Fed. (2d) 727; *Christopher* v. *Brusselback*, 302 U. S. 500; *Russell* v. *Todd*, 309 U. S. 280, 286.

The decisions in *Erie* v. *Tompkins*, 304 U. S. 64 and *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202, did not affect rights created by a federal statute. The case of *Guaranty Trust Company of New York* v. *York* decided by this court on June 18, 1945 in essence held that where the jurisdiction of the court is predicated upon diversity of citizenship that all state laws statutory or judicial are binding upon federal courts in the same manner as if the action were brought in the state court. But that decision by its clear language is inapplicable to the instant case. At the outset of the opinion Mr. Justice Frankfurter specifically stated:

> "We put to one side the considerations relevant in disposing of questions that arise when a federal court is adjudicating a claim based on a federal law" (p. 3, printed copy of Opinion).

In the present suit the right given to creditors of a joint stock land bank is created by a federal statute. The trial court found that the plaintiffs were not guilty of laches and that the defendants could not invoke laches when the delay was occasioned by their own inequitable conduct (R. 104).

It is undoubtedly true that in the ordinary case with nothing else appearing federal courts sitting in equity will apply statutes of limitation by analogy but where, as in this case, the trial court found as a fact that the defendants were found guilty of inequitable conduct, the rule of laches which obtains in the federal court is the one applied by the District Court, namely that laches will not be invoked against the plaintiffs until the defendants are discovered. In *Holmberg* v. *Anchell*, 24 Fed. Supp. 594,

603, the rule was stated by the late United States District Judge, John M. Woolsey as follows:

> "Laches may not be invoked by parties in hiding until they are found."

In *Momand* v. *Universal Film Exchange*, 43 Fed. Supp. 996, 1010, and *Garvy* v. *Wilder*, 121 Fed. (2d) 714, 715, the courts held that the date of maturity of a cause of action is a federal question.

Argument.

POINT II.

The Circuit Court erroneously extended the rule enunciated by this court in the case of *Guaranty Trust Company* v. *York* to apply to rights created by federal statute particularly in view of the clearly expressed intent by this court not to consider the effect of state statutes upon rights created by a federal statute. The Circuit Court's reliance upon the decision in this court in *Russell* v. *Todd* is equally erroneous because in the *Russell* case there was no finding by the lower courts that the defendants were guilty of inequitable conduct. It thus presented the ordinary case in equity which we mentioned above.

Our starting point should be the law of equitable jurisprudence applicable to federal courts which in the present case remains inviolate because the basis of the action is a right created by federal statute. In the Guaranty Trust Company opinion, Mr. Justice Frankfurter commented upon this distinction as follows:

> "Dicta may be cited characterizing equity as an independent body of law. To the extent that we have indicated, it is. But insofar as these general observations go beyond that, they merely reflect no-

tions that have been replaced by a sharper analysis of what federal courts do when they enforce rights that have no federal origin." (p. 13, printed copy of Opinion).

In actions solely cognizable in equity, the general rule is that mere lapse of time will not constitute laches. *Southern Pacific* v. *Bogert*, 250 U. S. 483, 488-490; *St. Louis* v. *Spiller*, 14 F. (2d) 288, affirmed 274 U. S. 304. It is true that a number of cases have held that state statute of limitations, in comparable actions, will ordinarily be used as a guide in determining whether a plaintiff has been guilty of laches in instituting his action, *e. g. Benedict* v. *City of New York*, 250 U. S. 321; *Kirby* v. *Lake Shore & Michigan Southern R. R.*, 120 U. S. 130. But, basically, statutes of limitations so applied are merely guides in measuring laches. For, in the final analysis, the applicability of the doctrine of laches depends upon the circumstances of each particular case (*Abraham* v. *Ordway*, 138 U. S. 416). The finding by the District Court that defendants were guilty of inequitable conduct is in effect a finding that defendants are estopped from asserting laches and relegates this case to the application of the general rule of laches without the limitations imposed by later qualifying authorities whether by analogy or otherwise.

Other cases relied upon by the Circuit Court are easily distinguishable. In *Ball* v. *Gibbs*, 118 Fed. (2d) 958, the defendant transferred shares of stock to his daughter and retransferred them to himself and again to his daughter. The identity of family names and the transfers and retransfers were matters of record. In the instant case, the defendant Bache was a member of a stock brokerage firm and the transfer to Armbrecht, who might well have been a regular customer of the firm, was no indication that the transfer was intended as a cloak to shield the

real transaction. The District Court found as a fact that information arousing suspicion was disclosed to plaintiffs in December, 1941 or January, 1942 (R. 110).

The cases of *Friede* v. *Jennings* and *Friede* v. *Sprout* (R. 120) relied upon by the Circuit Court as authority for the proposition that the assessment authorized by the federal statute is enforceable in state courts are wholly inapplicable. Whether such an action could or could not be brought in a state court is seriously open to question. It so happens that the above two cases were brought by Ervin I. Friede, the receiver of the same bank involved in the present suit, and both were actions at law predicated upon the theory that the decree of assessment obtained in the domiciliary jurisdiction was *res adjudicata* as to the insolvency of the bank and the necessity of the 100% levy. Those actions were brought before the reversals in *Christopher* v. *Brusselback*, 302 U. S. 500 and *Holmberg* v. *Carr*, 86 Fed. (2d) 727, which completely nullified the theory that the action could be brought in the law court (R. 36).

The Circuit Court also relied upon an Ohio decision (R. 121) and then stated:

> "To permit a different treatment in the federal courts would therefore constitute an undesirable inroad on the practical policy of uniformity embodied in *Erie R. Co.* v. *Tompkins, supra*, to the same extent as the permission of such variation would have been in the *York* case" (R. 121).

The uniformity sought relates to cases where federal jurisdiction is based only on diversity of citizenship. Quite the contrary is true where the action is based upon a right created by federal statute because chaos and confusion would result if that right was subjected to state statutes and local judicial law. Uniformity in such cases can only

be accomplished by maintaining a separate federal jurisprudence affecting the United States Constitution and federal statutes.

We submit that none of the above discussed cases would warrant the Circuit Court in extending the rule of the *Guaranty Trust Co.* v. *York* case to apply to rights created by federal statutes particularly with reference to the facts found in this case by the District Court.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing the decision of the Circuit Court of Appeals.

Respectfully submitted,

EDMUND BURKE, JR.,
Counsel for Petitioner.

FRANKLIN S. WOOD,
CLARENCE FRIED,
Of Counsel.
20 Exchange Place,
New York 5, New York.

FILE COPY

Supreme Court of the United States

October Term, 1945.

No. 505.

GEORGE C. HOLMBERG, FRANK C. BALL, CARL J. EASTERBERG, GEORGE F. HARDIE and PAT B. MORRIS, on behalf of themselves and all other creditors of the SOUTHERN MINNESOTA JOINT STOCK LAND BANK OF MINNEAPOLIS,

Petitioners,

AGAINST

CHARLES ARMBRECHT and GILBERT MILLER, BARBARA RICHARDS MICHEL, MURIEL RICHARDS PERSHING and DOROTHY RICHARDS HIRSHON, as Executors under the Last Will and Testament of JULES S. BACHE, deceased,

Respondents.

PETITIONERS' BRIEF.

EDMUND BURKE, JR.,
Counsel for Petitioners.

FRANKLIN S. WOOD,
CLARENCE FRIED,
Of Counsel.

INDEX.

	PAGE
Petitioners' Brief	1
Opinions of Court Below	1
Grounds of Jurisdiction of the Supreme Court	2
Statement of the Case	2
Specification of Errors	9
Summary of Argument	9
Argument	10
Point I	10
Point II	16

STATUTES CITED.

12 U. S. C. A. 64A	14
12 U. S. C. A. 811	10
12 U. S. C. A. 812	10, 14
28 U. S. C. A. 347	2
28 U. S. C. A. 725	11

CASES CITED.

Abraham v. Ordway, 138 U. S. 416	12
Ball v. Gibbs, 118 Fed. (2d) 958	9
Benedict v. City of New York, 250 U. S. 321	9
Brusselback v. Cago, 85 Fed. (2d) 20	10

PAGE

Christopher v. Brusselback, 302 U. S. 500 10
Clearfield Trust v. United States, 318 U. S. 363 ... 15

Deitrick v. Greaney, 309 U. S. 190 13
D'Oench v. Federal Deposit Ins. Corp., 315 U. S. 447 13
Duke v. Johnson, 123 Wash. 43, 211 Pac. 710 20

Erie v. Tompkins, 304 U. S. 64 13

Friede v. Jennings, 121 Conn. 220, 184 A. 364 ... 10
Friede v. Sprout, 294 Mass. 512, 2 N. E. (2d) 549 10

Garvey v. Wilder, 121 Fed. (2d) 714, 715 18
Germania Nat. Bank v. Case, 99 U. S. 628 20
Guaranty Trust Company of New York v. Grace W. York, U. S. Supreme Court, decided June 18, 1945 ..... 9, 11, 13

Holmberg v. Anchell, 24 Fed. Supp. 594, 603 .... 5, 17, 19
Holmberg v. Carr, 86 Fed. (2d) 727 ..... 8, 10

Kirby v. Lake Shore, 120 U. S. 130 9

McCaslin v. Albertson, 273 N. W. 302 ..... 20, 21
McDonald v. Dewey, 202 U. S. 510 20
Mencher v. Richards, 283 N. Y. 176 5
Momand v. Universal Film Exchange, 43 Fed. Supp. 996, 1010 18

Ohio Nat. Bank v. Hulitt, 204 U. S. 162 20

Peters v. Bain, 133 U. S. 670 20
Pufahl v. Parks, 299 U. S. 217, 223 17

Rankin v. Fidelity Ins. Co., 187 U. S. 242 20
Rawlings v. Ray, 312 U. S. 96, 98 18
Robinson v. Campbell, 3 Wheat 212, 4 L. Ed. 372.. 11
Ruhlin v. New York Life Insurance Co., 304 U. S. 202 13
Russell v. Todd, 309 U. S. 280 ..... 5, 10, 12, 13, 15

PAGE

St. Louis v. Spiller, 14 Fed. (2d) 288, affirmed 274 U. S. 304 ..... 12, 17
Southern Pacific v. Bogert, 250 U. S. 483, 488-490 .. 9
Stewart v. Collins, 36 Wyo. 210, 254 Pac. 137 20
Stuart v. Haydon, 169 U. S. 1 20

U. S. v. Howland, 4 Wheat 108, 4 L. Ed. 526 11

Wheeler v. Green, 280 U. S. 49 10
Wyman v. Wallace, 201 U. S. 230 5

TEXTS CITED.

Michie on Banks and Banking 19

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 505.

GEORGE C. HOLMBERG, FRANK C. BALL, CARL J. EASTERBERG, GEORGE F. HARDIE and PAT B. MORRIS, on behalf of themselves and all other creditors of the SOUTHERN MINNESOTA JOINT STOCK LAND BANK OF MINNEAPOLIS,

Petitioners,

AGAINST

CHARLES ARMBRECHT and GILBERT MILLER, BARBARA RICHARDS MICHEL, MURIEL RICHARDS PERSHING and DOROTHY RICHARDS HIRSHON, as Executors under the Last Will and Testament of JULES S. BACHE, deceased,

Respondents.

PETITIONERS' BRIEF.

I.

Opinions of Courts Below.

The opinion of the District Court was rendered on November 1, 1944 (R. 99). Official citation is not yet available. The opinion of the Circuit Court of Appeals is reported in 150 Fed. (2d) 829.

II.

Grounds of Jurisdiction of the Supreme Court.

1. The date of the judgment to be reviewed is July 13, 1945 (R. 122).

2. The statutory provision which is believed to sustain the jurisdiction of the court is 28 U. S. C. A. 347.

3. The cause of action asserted by petitioners as creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis, is created by a federal statute (12 U. S. C. A. 812) and the ruling by the Circuit Court that this cause of action is governed by a state statute of limitations is a decision of a federal question which vitally affects all rights created by federal statutes and is probably in conflict with the decisions of this court and the questions involved are substantial.

4. The case believed to sustain said jurisdiction is as follows: *Wyman* v. *Wallace*, 201 U. S. 230.

III.

Statement of the Case.

The Southern Minnesota Joint Stock Land Bank of Minneapolis closed its doors on May 2, 1932, when the Federal Farm Loan Board appointed a receiver in accordance with the provisions of the Federal Farm Loan Act (R. 34).

Creditors of the bank, the same complainants in this case, instituted an action in the United States District Court, District of Minnesota, Fourth Division on July 28, 1932. In that action the complainants sought to obtain

a judgment against all stockholders of the bank resident in the State of Minnesota and elsewhere. Service was made upon the stockholders who could be found or were residents of the State of Minnesota. All other Stockholders were served by publication and by mail pursuant to the order of United States District Judge Gunnar H. Nordbye, dated July 28, 1932 (R. 35). The affidavit of mailing states that a copy of the order was sent to Charles Armbrecht at the address listed on the stock books of the bank (R. 85). The action in the Minnesota District Court extended over a period of three years and resulted in the entry of a decree on April 20, 1935, which determined that an assessment of 100% against the stockholders was necessary and provided for the appointment of an equity receiver to enforce the assessment on behalf of the creditors against the stockholders of the bank (R. 35, 46).

The matter was then referred to attorneys in New York for such further proceedings as were necessary to carry into effect the decree of the Minnesota Court. On October 19, 1935, a demand letter was sent to the defendant Charles Armbrecht c/o J. S. Bache & Co., 42 Broadway, New York City (Plaintiffs' Exhibit 9). On or about December 11, 1935, proceedings were instituted in the United States District Court for the Southern District of New York for the appointment of an ancillary equity receiver upon the theory that the judgment obtained in the domiciliary jurisdiction constituted *res adjudicata* as to the assets and liabilities of the bank and the necessity for a 100% assessment against stockholders. In that action, besides the bank and the receiver, three New York stockholders were named. The proceedings were opposed by one of the stockholders and his motion to dismiss the bill was denied and a motion to strike the answer of the defendant and for the appointment of Ervin J. Friede as ancillary receiver was granted by order of U. S. D. J. Robert P. Patterson, dated April 23, 1936 (R. 36).

After the appointment of Ervin J. Friede, actions at law were instituted in his name as ancillary receiver against the stockholders. One of such actions was entitled *Ervin J. Friede, as Ancillary Receiver for Creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis*, Plaintiff, v. *Charles Armbrecht*, Defendant, index No. L65-73, in the Southern District Court of New York. Defendant could not be served at the office of J. S. Bache & Co., but was served at 2565 Marion Avenue (R. 37), an address furnished by the process server and purportedly received from the City Directory (R. 59). Said service was made on August 13, 1936. The defendant defaulted in pleading. A statement for judgment was prepared and verified October 27, 1936, but was never entered due to the necessity of proving the bill of complaint against the defendant *pro confesso*, which became impossible after the decision by this Court (R. 37).

In the meantime an appeal having been taken to the Circuit Court for the Second Circuit from the decree of Judge Patterson, and a decision having been rendered by the Circuit Court on December 24, 1936, the appointment of Ervin J. Friede as ancillary receiver was declared ineffective, and the order of Judge Patterson reversed with leave to complainants to serve an amended complaint. The opinion of the Circuit Court even went so far as to state that the District Court of Minnesota had no power or authority to appoint an equity receiver (*Holmberg* v. *Carr*, 86 Fed. [2nd] 727) (R. 37).

Thereafter and pursuant to the Order on Mandate made by Judge Patterson dated February 19, 1937, an amended bill of complaint was prepared and filed on or about April 17, 1937 (R. 38). All actions instituted in the name of Ervin J. Friede were discontinued, and in the amended complaint brought on behalf of the complainants, all stockholders of the bank were named. There were approximately 176 defendants (R. 84). The name of

Charles Armbrecht appears in Exhibit A annexed to the complaint as the record owner of 100 shares of stock, and the address given on the Exhibit is the one that appeared upon the books and records of the bank, to wit: c o J. S. Bache & Co., 42 Broadway, New York City (R. 84).

The complaints were delivered to the U. S. Marshal with instructions to serve all defendants, and were returned by the Marshal reporting service could not be made on Charles Armbrecht, together with a check in the sum of $103.40 representing the balance of the deposit given to the Marshal for his services (R. 84). After the return by the Marshal, a private process server was again requested to locate the defendant and reported that he was no longer at 2565 Marion Avenue (R. 50). Attempts by Clarence Fried, an attorney in the office of Franklin S. Wood, to locate the whereabouts of said defendant were equally unsuccessful (R. 40).

The case of *Holmberg* v. *Anchell* proceeded to trial before the late Judge Woolsey and lasted almost two months (R. 40). On or about August 20, 1938, Judge Woolsey handed down his decision wherein he found that the liabilities of the bank exceeded its assets to the extent of $11,455,828.42 (*Holmberg* v. *Anchell*, 24 Fed. Sup. 594). After hearings regarding findings of fact and conclusions of law, judgment was entered on January 23, 1939. An appeal was taken from that judgment, and although the briefs were filed prior to November 9, 1939, it was not finally determined until June 5, 1940, because in the meantime the same questions of law as to laches and the applicability of the New York State statute of limitations involved in this case were awaiting decision in the Supreme Court of the United States (*Russell* v. *Todd*, 309 U. S. 280) and in the New York Court of Appeals (*Mencher* v. *Richards*, 283 N. Y. 176). (R. 41).

Complainants then examined various defendants in supplementary proceedings and made investigations for the

purpose of winding up liquidation of the bank and bringing in as defendants those stockholders who were not served in the previous action (R. 42).

In December of 1941 or January of 1942 as a result of this investigation, information was received from the process server that Charles Armbrecht was a retired employee of J. S. Bache & Co. receiving a pension and that when he was employed he held a subordinate position with that firm (R. 42).

Up to that time the complainants had no information as to the identity of Charles Armbrecht, nor did they have any proof that the Charles Armbrecht who resided at 2565 Marion Avenue and who was served and defaulted in 1936 was the same Charles Armbrecht who appeared as the owner of record of the stock of this bank (R. 54). After correspondence and discussion with the Minnesota attorneys, it was agreed to institute suit against J. S. Bache & Co. as the real owners of the stock registered in the name of Charles Armbrecht (R. 42) on the information then acquired that Charles Armbrecht was a retired employee of that firm.

Shortly after the complaint was served, the attorneys for the defendant, Morton F. Stern, sued as a partner of J. S. Bache & Co. requested an extension of time which was granted upon the condition that the address of Charles Armbrecht be disclosed. The address given, 1971 Webster Avenue, was one from which defendant Armbrecht had already moved (R. 44). However, service was purportedly made at 2980 Valentine Avenue, the home of his son, on May 29, 1943 (R. 44). Prior to this purported service, a registered letter was sent to the defendant Charles Armbrecht c/o J. S. Bache & Co., 36 Wall Street, New York City, and was returned with the notation "not found with care." This was a registered letter with return receipt requested to be delivered to the addressee only (R. 85).

In September, 1942, Mr. Stern was examined at the office of Franklin S. Wood and his examination revealed that 100 shares of stock were charged to the account of Jules S. Bache personally (Par. 12, complaint R. 9. R. 26). This was the first actual information received by the complainants as to the real and beneficial ownership of the stock registered in the name of Charles Armbrecht (R. 58). The case was upon the trial calendar, and after a notice of pre-trial hearing was served, a notice of motion was served on or about March 24, 1943, to quash service of the summons and complaint upon the defendant Charles Armbrecht (R. 44). In the meantime, the trial of the first action had been adjourned pending the outcome of the decision of Judge Hulbert on the question of service. On October 20, 1943, after numerous hearings an order was made quashing service of the summons and complaint on the defendant Charles Armbrecht. Immediately thereupon a summons and complaint in the second action naming Charles Armbrecht and Jules S. Bache as defendants was prepared and filed on November 13, 1943 (R. 44).

In the examination before trial of the defendant, Charles Armbrecht, taken on April 19, 1944, he testified that he never purchased any stock of the bank, that he was never advised by Mr. Jules S. Bache that the stock was to be registered in his name, that he knew nothing about the shares in his name until this action was instituted, that he never used any of his own money for the purchase of stock, that he never had as much as $10,000 (R. 32) and could not respond to a judgment in that amount.

Plaintiffs' Exhibits 1 and 2 (R. 80, 81) show that the 100 shares of stock were issued to the defendant Charles Armbrecht in two certificates of 50 shares each on January 23, 1928. They were transferred from J. S. Bache & Co. to Charles Armbrecht and the cancelled certificates (R.

90-97) each bear a stamped statement which reads as follows:

> "We hereby certify that the transfer of the within shares to the names indicated by the star is made solely to complete the purchase made by us for our customer, and we have no ownership or interest therein.
>
> J. S. Bache & Co.
> 42 B'way
> N. Y."

Paragraph Tenth of the complaint alleges that the transfer to Charles Armbrecht was fraudulent and that the name of the latter was used as a nominal party or "dummy" for the sole purpose of avoiding the statutory liability imposed by the Federal Farm Loan Act (R. 8).

In paragraph 2 of the answer of Jules S. Bache (R. 14), the beneficial ownership by said Jules S. Bache of the stock in the record name of Charles Armbrecht is admitted. As early as October, 1931, this stock registered in the name of Charles Armbrecht was charged on the books of J. S. Bache & Co. to the personal account of Jules S. Bache and was so charged until January 3, 1933, when the account was changed in name only "From the long account to the loan account" (R. 72). During all this time the certificates of stock were physically located in the vaults of J. S. Bache & Co. (R. 73).

The trial judge in his opinion stated: "Furthermore, when Bache used Armbrecht as a dummy to suit his own purpose, he forsook any claim to later injury for failure to recognize him as a defendant earlier and that claim now comes with bad grace" (104).

The trial in the District Court was had without a jury and a judgment was rendered by the Trial Court in favor of plaintiffs and against the defendants in the sum of

$10,000. The Trial Court found as a fact that plaintiffs were not guilty of laches; that Charles Armbrecht was used as a "dummy" by respondent Jules S. Bache; that defendants were guilty of inequitable conduct; and that laches could not be invoked by defendants who were in hiding until they were discovered by plaintiffs (R. 104). On appeal from said judgment the Circuit Court of Appeals for the Second Circuit reversed the decree of the District Court on the authority of *Guaranty Trust Company of New York* v. *York*, 65 Sup. Ct. 1464. None of the findings of fact made by the District Court were disturbed, the Circuit Court of Appeals having reversed the decree of the Trial Court solely as a matter of law on the ground that under the ruling of this court in the *Guaranty Trust* case the New York State statute of limitations was absolutely binding upon the Federal Court (R. 113-121).

IV.

Specification of Errors.

1. The Circuit Court of Appeals erred in holding that this action was governed by the New York State statute of limitations.

2. The Circuit Court erred in its unwarranted extension of the rule enunciated by this court in the case of *Guaranty Trust Company* v. *York*, 65 Sup. Ct. 1464.

3. The Circuit Court erred in its inferential holding that the cause of action accrued on May 2, 1932.

V.

Summary of Argument.

1. This action is predicated upon a Federal statute creating a right solely cognizable and enforceable in equity and is governed by the doctrine of laches.

2. The undisturbed findings of fact made by the Trial Court are inconsistent with any ruling that the plaintiffs were guilty of laches or that the cause of action is barred by any state statute of limitations.

VI.

Argument.

POINT I.

Joint stock land banks are organized under an Act of Congress (12 U. S. C. A. 811). The liability of stockholders in a joint stock land bank is created by a Federal Act (12 U. S. C. A. 812) which reads as follows:

> "Shareholders of every joint-stock land bank organized under this chapter shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such bank to the extent of the amount of stock owned by them at the par value thereof, in addition to the amount paid in and represented by their shares. July 17, 1916, c. 245, 16, 39 Stat. 374."

After years of litigation, the law regarding joint stock land banks became crystallized. It is now undisputed that this action is enforceable only in equity and there is no concurrent remedy at law: (*Wheeler* v. *Green*, 280 U. S. 49; *Russell* v. *Todd*, 309 U. S. 280; *Christopher* v. *Brusselback*, 302 U. S. 500; *Brusselback* v. *Cago*, 85 Fed. [2d] 20; *Holmberg* v. *Carr*, 86 Fed. [2d] 727).

The distinguishing feature of this type of action was lucidly stated by Chief Justice Stone in *Russell* v. *Todd* as follows (p. 286):

> "It is for this reason that there is a divergence between the procedure for recovering assessments of shareholders of national banks, and that for enforcing the liability of shareholders in a Federal land bank. In the latter case there is no legal remedy, the relief being afforded exclusively in equity. The test of the inadequacy of the legal remedy prerequisite to resort to a Federal Court of equity is the legal remedy which Federal rather than State courts afford. *Di Giovanni* v. *Camden F. Ins. Asso.*, 296 U. S. 64, 80 L. ed. 47, 56 S. Ct. 1; *Atlas L. Ins. Co.* v. *W. I. Southern*, 306 U. S. 463, 83 L. ed. 987, 59 Ct. 657. And the jurisdiction of Federal courts of equity, as determined by that test, is neither enlarged nor diminished by the names given to remedies or the distinction made between them by State practice. *Stratton* v. *St. Louis, S. W. R. Co.*, 284 U. S. 530, 534, 76 L. ed. 465, 469, 52 S. Ct. 222."

To apply a state statute of limitations to the instant case, upon the authority of *Guaranty* v. *York*, is to disregard the admonition of Mr. Justice Frankfurter at the very beginning of that opinion:

> "We put to one side the consideration relevant in disposing of questions that arise when a federal court is adjudicating a claim based on a federal law" (65 Sup. Ct. 1465).

In the present action a federal court was adjudicating a claim in equity based on a federal law.

Since an early date the phrase "trials at common law" in the Rules of Decision section of the Federal Judiciary Act of 1789 (28 U. S. C. A. 725) was held not to include suits in equity. *Robinson* v. *Campbell*, 3 Wheat 212, 4 L. Ed. 372; *U. S.* v. *Howland*, 4 Wheat 108, 4 L. Ed. 526. In

Russell v. *Todd*, 309 U. S. 280, 287, this was tersely reaffirmed. "The Rules of Decision Act does not apply to suits in equity".

The barometer used in determining whether a suit in equity should be barred has always been laches and not strictly speaking an arbitrary period of time as fixed by a statute of limitations and in considering the former mere lapse of time did not constitute laches except when it was shown to have resulted in a prejudice to the defendant. *Southern Pacific* v. *Bogert*, 250 U. S. 483, 488-490; *St. Louis* v. *Spiller*, 14 Fed. (2nd) 288, aff. 274 U. S. 304. The doctrine of laches was somewhat limited in its measure by applying statutes of limitations by analogy. *Benedict* v. *City of New York*, 250 U. S. 321, *Kirby* v. *Lake Shore & Michigan Southern R.R.*, 120 U. S. 130, *Early* v. *City of Helena*, 87 Fed. (2nd) 831. Nevertheless, statutes of limitations so applied are mere guides in determining whether a plaintiff has been guilty of laches. For, in the final analysis laches is considered according to the facts and circumstances of each particular case. *Abrahams* v. *Ordway*, 158 U. S. 416.

The general rules relating to the doctrine of laches were well stated in *St. Louis & U. S. F. R. Co.* v. *Spiller*, 14 Fed. (2nd) 284, 288, as follows:

> "Laches is an equitable doctrine, not controlled by or dependent upon statutes of limitation, although courts quite generally consider the time fixed by such statutes in actions at law of like character as having some bearing on the pertinency of the doctrine of laches, or, perhaps more accurately stated, on the burden of proof with respect thereto.
>
> The applicability of the doctrine of laches is dependent upon the circumstances of each particular case. (Citing cases.)
>
> Mere lapse of time does not constitute laches. In addition, it must appear that something has oc-

curred that would make it inequitable to grant the relief prayed for. (Citing cases.)

Laches cannot exist as to a party, unless he has legal knowledge of the facts affecting his rights. *Galliher* v. *Cadwell*, 145 U. S. 368, 12 S. Ct. 873, 36 L. Ed. 738.

The doctrine of laches is to assist and not to defeat justice—it is to be determined by considerations of justice. (Citing cases.)"

Nothing that was said or held in *Erie* v. *Tompkins*, 304 U. S. 64, *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202, *Russell* v. *Todd*, 309 U. S. 280, or *Guaranty Trust* v. *York*, 65 Sup. Ct. 1464, requires the absolute application of statutes of limitations as measuring rods in actions exclusively cognizable in equity in federal courts, based on a federally created right. None of the aforementioned cases, except *Russell* v. *Todd*, involved or affected rights under federal statutes. *Russell* v. *Todd*, did involve a federal statute, but was the ordinary case where, nothing else appearing, courts of equity apply statutes of limitations by analogy.

On the other hand, in *Deitrick* v. *Greaney*, 309 U. S. 190 and in *D'Oench D. & Co.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447, which involved rights created under federal statutes, state laws were held inapplicable.

In the *Deitrick* case the defendant in a suit on a promissory note set up want of consideration and illegality as a defense to the action and this court said (p. 196):

"It is a principle of the widest application that equity will not permit one to rely on his own wrongful act, as against those affected by it but who have not participated in it, to support his own asserted legal title or to defeat a remedy which except for his misconduct would not be available."

A major point, discussed in the briefs and arguments was, did Massachusetts law preclude respondent from asserting his defense? The court refused to consider the question and held this matter was to be determined by federal law (p. 201):

> "We have recently held that the judicial determination of the legal consequences which flow from acts condemned as unlawful by the National Banking Act involves decision of a federal, not a state question."

An interesting analogy may be drawn from the *D'Oench* case because this Court held that a federal court was not bound to follow state law in determining questions with regard to rights created by federal statutes. It then went on to state (p. 457):

> "These provisions (Federal Reserve Act, 12 U. S. C. A. 264) reveal a federal policy to protect respondent and the public funds which it administers against misrepresentations as to the security or other assets in the portfolios of the banks which respondent insures or on which it makes loans" (Parentheses ours.)

By the same token, in the case at bar, under the Federal Farm Loan Act, 12 U. S. C. A. 812, it was the apparent purpose of Congress to protect investors and creditors of joint stock land banks. The policy of Congress in affording this protection and security to creditors was clearly manifested in the retention of the double liability with respect to joint stock land banks although the similar liability with respect to national banks has been abolished (12 U. S. C. A. 64A). As a matter of fact, the double

liability created by the Banking Law of the State of New York has been abolished in New York and was similarly abolished in a majority of other states. Parenthetically, it may be noted that the statement by Mr. Justice Stone in *Russell* v. *Todd*, 309 U. S. 280, 293, that, "In thus giving effect to state statutes of limitations as a substitute or supplement for the equitable doctrine of laches, it must appear with reasonable certainty that there is a state statute applicable to like causes of action", presupposes that there is a "like cause of action" under the New York statutes. We have already indicated the unique features of this type of action. Bearing in mind that the joint stock land bank is almost the only banking institution concerning which double liability is still enforceable, the following statement of the district judge takes on a more cogent meaning, and now applies with greater force (R. 103).

> "The liability of the statute is intended to afflict every shareholder but is enforceable only where each resides and since their wide geographical distribution is normally *a fact*, the remedy would certainly not work out equally and ratably but inequitably as between themselves if the several stockholders found each a shield in his state's statute of limitations." (Italics ours to show correct wording of opinion. Words in record "to affect" erroneous.)

The policy of rejecting state law where it conflicts with or render the federal rules inequitable was approved by this Court in *Clearfield Trust* v. *United States*, 318 U. S. 363, where after pointing out that frequently in its search for applicable federal rule federal courts have occasionally selected state law, it then went on to say, however, that state law would be discarded if inconsistent with federal policy (p. 367):

> "But reasons which may make state law at times the appropriate federal rule are singularly inappropriate here." * * *
>
> "It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain."

In the same opinion, the court said (p. 367):

> "In absence of an applicable Act of Congress, it is for the federal courts to fashion the governing rule of law according to their own standards."

In the instant case, the federal statute which created the liability did not prescribe either the manner of enforcement or the agency or person to enforce the liability. The procedure was fashioned only afte rlong years of litigation (R. 134). Consequently, in this type of case, in accordance with the well established rule of the federal courts the proper rule to be applied is the rule of laches and whether the measure is t be limited by the qualifying authorities referred to above must depend on the particular facts of this case.

POINT II.

The Trial Court found that the defendants were guilty of inequitable conduct by creating a false and fictitious record ownership to secrete the real and beneficial ownership of the stock in the defunct bank (R. 104). The Trial Court also found that the plaintiffs were not guilty of laches (R. 102), and that the delay was not prejudicial to the defendants (R. 104).

The information which led to the institution of this action was acquired by the plaintiffs in December, 1941 or January, 1942 (R. 102). As a matter of fact, this in-

formation which merely disclosed suspicious circumstances as to the true ownership of the stock registered in the name of Charles Armbrecht did not ripen into "legal knowledge" until September, 1942 as a result of proof obtained at the pre-trial examination of one of the partners of J. S. Bache & Co. (R. 58).

The statement by the court in *St. Louis* v. *Spiller*, 14 Fed. (2nd) 288, that, "Laches cannot exist as to a party unless he has legal knowledge of the facts affecting his rights" is therefore particularly appropriate.

The Circuit Court did not reverse any of the findings of the District Court and yet stated "eleven and one-half years after the bank's failure, this action was commenced against Bache and Armbrecht" (R. 116).

There is an inferential finding by the Circuit Court from the foregoing that the cause of action accrued at the time of the bank's failure. There is nothing in the record to sustain this finding except the bare fact that the bank closed on May 2, 1932. When a cause of action accrues, with reference to stockholders' liability in a joint stock land bank is open to question in the ordinary case. In *Pufahl* v. *Parks*, 299 U. S. 217, 223, this court referred to the statutory liability of stockholders as a "contingent obligation" and said it was "rendered absolute by the Comptroller's action". In the present suit, the mere closing of the bank would not render the obligation absolute. That the assets of the bank are insufficient to pay its liabilities is the factor which converts the contingent obligation to a fixed one. It may be that the cause of action accrues when the bank is completely liquidated by the statutory receiver or when there was a judicial determination of the value of the assets and liabilities, the latter of which was not obtained until April 20, 1935 after three years of litigation (R. 35). But regardless of when the cause of action accrues in the ordinary case, here, by reason of the facts involved the accrual of the cause of ac-

tion is determined by the special rule so well stated by the late Judge John M. Woolsey, in *Holmberg* v. *Anchell*, 24 Fed. Sup. 594, 603, "Laches may not be invoked by parties in hiding until they are found."

This is in accord with the well established principle that the accrual of the cause of action based upon a right created by an act of Congress is controlled by federal law.

In *Momand* v. *Universal Film Exchange*, 43 Fed. Supp. 996, 1010 the court said:

> "In determining whether a cause of action has accrued, the law which governs is the law of the jurisdiction which gives the cause of action, not the law which supplies the applicable period of limitation. *Rawlings* v. *Ray*, 312 U. S. 96, 98, 61 S. Ct. 473, 85 L. Ed. 605. Therefore, in determining when this plaintiff's causes of action accrued, the law which governs is the law of the United States which gives the private right to sue for damages suffered from violations of the Anti-trust laws. On this point Massachusetts or Oklahoma law is not controlling."

To the same effect see *Garvy* v. *Wilder*, 121 Fed. (2nd) 714, 715 where the court said:

> "The date of the maturity of the cause of action is a Federal question."

The question of the accrual of the cause of action arose in *Rawlings* v. *Ray*, 312 U. S. 96, 98 where a receiver of a national bank brought suit to recover on an assessment made by the Comptroller against stockholders. Presumably the action was at law, nevertheless, in reversing the dismissal of the complaint, this court said:

> "The question as to the time when there was a complete and present cause of action so that the

> receiver could enforce by suit the liability imposed by the Comptroller's assessment is a federal question and turns upon the construction of the assessment and the authority of the Comptroller to make it under the applicable federal legislation."

A situation almost identical to that presented in the instant case was involved in *Holmberg* v. *Anchell*, 24 Fed. Sup. 594 where suspicion of the real ownership of stock was revealed by the mere similarity of names and technique adopted by the defendants who were also defendants in another action pending in the same District Court. As to the accrual of the action Judge Woolsey said:

> "If there be any basis for argument to support a claim for laches by the record stockholders there is none by the concealed beneficial owners of stock such as John H. Gertler and Michael J. Devlet. For I hold that, as to them, the plaintiff's right of action did not accrue at least until the complaint was filed in the case of *Brusselback et al.* v. *Cago Corporation et al., supra*, on August 8, 1935, when investigations of the Ota Corporation, stimulated by that complaint, led the plaintiffs herein to make the same allegations in regard to Ota Corporation as the plaintiffs in the *Brusselback* case had made as to Cago Corporation. Laches may not be invoked by parties in hiding until they are found."

The finding by the District Court that the defendants were guilty of inequitable conduct, under the facts of this case, is well sustained by authorities. The transfer by the defendant Jules S. Bache of stock in the Southern Minnesota Joint Stock Land Bank of Minneapolis to an irresponsible record holder is a fraud upon creditors.

In Michie on Banks and Banking, Vol. II, Permanent Edition, Section 136, the author states:

> "A transfer by a stockholder for the mere purpose of avoiding his statutory liability is fraudulent and void, and he remains liable."

In support of this proposition the following cases are cited:

> *Germania Nat. Bank* v. *Case*, 99 U. S. 628;
> *Rankin* v. *Fidelity Ins. Co.*, 189 U. S. 242;
> *Ohio Nat. Bank* v. *Hulitt*, 204 U. S. 162;
> *Stuart* v. *Haydon*, 169 U. S. 1;
> *Peters* v. *Bain*, 133 U. S. 670;
> *Duke* v. *Johnson*, 123 Wash. 43, 211 Pac. 710;
> *Stewart* v. *Collins*, 36 Wyo. 210, 254 Pac. 137;
> *McDonald* v. *Dewey*, 202 U. S. 510.

In the *Germania* case the Supreme Court of the United States stated (p. 631):

> "While it is true that shareholders of the stock of a corporation generally have a right to transfer their shares, [632] and thus disconnect themselves from the corporation and from any responsibility on account of it, it is equally true that there are some limits to this right. A transfer for the mere purpose of avoiding his liability to the company or its creditors is fraudulent and void, and he remains still liable."

In a recent case *McCaslin* v. *Albertson*, 273 N. W. 302, 307, where a transfer was made for the purpose of avoiding the stockholder's liability and the statute which made transfers within 4 months void, the Court after discussing the 4 months provision ruled that it was immaterial whether the transfer was within 4 months or beyond that period of time "provided such transfer was made by the stockholder for the purpose of escaping his statutory liability and thus perpetrating a fraud upon the depositors and other creditors of such banking institution."

In the instant case the use of the name of Charles Armbrecht, a subordinate employee of J. S. Bache & Co., with full knowledge that he was wholly unable to respond for a judgment in the sum of $10,000 points to one inescapable conclusion, namely, that the transfer to Charles Armbrecht was for the purpose of avoiding the statutory liability.

In the *McCaslin* case, the Court at page 306 said:

> "The intent to avoid liability may be inferred from the facts and circumstances surrounding the transfer and this would be true notwithstanding the testimony of the appellant Martin that the transfer was made in good faith, to discharge obligations owing to him by his wife, and not for the purpose of avoiding liability."

Whatever questions of fact existed at the trial, have been determined adversely to the defendants and the findings were in no way disturbed by the Circuit Court. If the findings of the trial court are to be disregarded and the doctrine of laches held to be rigidly circumscribed by state statutes or judicial decisions the federal courts and the administration of federal laws and policy would be at the complete mercy and under the absolute control of state legislatures seeking to protect their own residents from liabilities of national consequence. We doubt that any such result was intended by this court or by any congressional mandate.

Respectfully submitted,

EDMUND BURKE, JR.,
Counsel for Petitioners.

FRANKLIN S. WOOD,
CLARENCE FRIED,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1945

No. 505

GEORGE C. HOLMBERG, FRANK C. BALL, CARL J. EASTERBERG, GEORGE F. HARDIE and PAT B. MORRIS, on behalf of themselves and all other creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis,

Petitioners,

vs.

CHARLES ARMBRECHT and GILBERT MILLER, BARBARA RICHARDS MICHEL, MURIEL RICHARDS PERSHING and DOROTHY RICHARDS HIRSHON, as Executors under the Last Will and Testament of JULES S. BACHE, deceased,

Respondents.

PETITIONERS' REPLY BRIEF

EDMUND BURKE, JR.,
Counsel for Petitioners.

FRANKLIN S. WOOD,
CLARENCE FRIED,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1945

No. 505

GEORGE C. HOLMBERG, FRANK C. BALL, CARL J. EASTERBERG, GEORGE F. HARDIE and PAT B. MORRIS, on behalf of themselves and all other creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis,

Petitioners,

vs.

CHARLES ARMBRECHT and GILBERT MILLER, BARBARA RICHARDS MICHEL, MURIEL RICHARDS PERSHING and DOROTHY RICHARDS HIRSHON, as Executors under the Last Will and Testament of JULES S. BACHE, deceased,

Respondents.

PETITIONERS' REPLY BRIEF

The respondents have been unable to cite any authority wherein it is held that a federal court sitting in equity in a case founded on a right created by federal statute and in which defendants were found guilty of inequitable conduct, nevertheless, was bound by a state statute of limitations. They argue that there should be no distinction between the present case and the Guaranty Trust v. York case. We have already pointed out that the uniformity sought with respect to rights created under a state law, as was involved in the Guaranty case, requires the reverse treatment when a federally created right is involved.

Respondents on page 15 of their brief admit the wisdom of disregarding state law to prevent the frustration of a

federal policy involving an important private right such as the one upon which the D'Oench case was predicated. We do not understand that this Honorable Court will differentiate between important private rights and those of lesser importance. The significant federal policy contained in 12 U. S. C. A. 812 is self-evident and is expressly set forth in the footnote on page 7 of the government's brief *amicus curiae.*

Respondents place great stress upon the custom prevailing among stock brokers of purchasing securities in the names of nominees. They assert that in the ordinary course of business, stocks were carried in the names of nominees and refer to Mr. Stern's testimony on page 70 wherein he stated, "Yes, we had two nominees besides our own name, both of them working in the cage." There is nothing in this statement to indicate that Armbrecht was one of the "two nominees" and there is no proof in the record that Armbrecht acted in that capacity. Aside from the fact that this would make little difference, it is small wonder that the Trial Court rejected defendants' contention when considered in the light of their own contradictions. In the deposition of Morton F. Stern (taken before Jules S. Bache was served and became involved in this litigation and at a time when defendant Bache believed himself immune because more than ten years had elapsed since the bank closed and at the time when the defendant Charles Armbrecht was in default upon the purported service made in May, 1942), he testified (R. 24):

> "Q. Was it the practice of J. S. Bache & Co. to purchase bank stocks in the name of nominal parties? A. We never purchased any securities in names other than the actual purchaser."

At the time of trial, after Jules S. Bache was made a party defendant, Mr. Stern altered his testimony to conform to the changed situation (R. 70):

"Q. Are you familiar with the custom in respect of the registration of stock in the name of others, for customers and other? A. Oh, yes.

"Q. What was the custom in 1932 and for five or six years previous to that in regard to having stock registered in the name of nominees? * * * The Witness: Yes, we had two nominees besides our own name, both of them working in the cage."

No mater how euphemistic we may try to be we can not avoid the conclusion that the transfer was fraudulent and within the lines of cases which holds that a transfer made for the express purpose of avoiding the stockholders' liability is a fraud upon credits.

The contention that Armbrecht was always available and could easily have been located is utterly belied by the fact that as late as May, 1942, Armbrecht could not be found by the wholly disinterested postal employees of the United States Government (R. 85).

The factual matters were considered by the Trial Court and the question of credibility passed upon by him. His findings were not upset by the Circuit Court and cannot be considered here, since the findings are amply supported by the record.

Respectfully submitted,

EDMUND BURKE, JR.,
Counsel for Petitioners.

FRANKLIN S. WOOD,
CLARENCE FRIED,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1945

No. 505.

GEORGE C. HOLMBERG, FRANK C. BALL, CARL J. EASTERBERG, GEORGE F. HARDIE and PAT B. MORRIS, on behalf of themselves and all other creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis,

Petitioners and Appellees below,

vs.

CHARLES ARMBRECHT and GILBERT MILLER, BARBARA RICHARDS MICHEL, MURIEL RICHARDS PERSHING and DOROTHY RICHARDS HIRSHON, as Executors under the Last Will and Testament of JULES S. BACHE, deceased,

Respondents and Appellants below.

BRIEF FOR DEFENDANTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CHESTER ROHRLICH,
Counsel for Defendants.

EDGAR M. SOUZA,
STANLEY GOLDSTEIN,
ALVIN D. LURIE,
of Counsel.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement	2
Summary of Argument	5
Argument:	
Point I—The New York Ten-Year Statute of Limitations is conclusive herein	6
Point II—Assuming that the doctrine of laches is applicable, the trial court should have found that the petitioners were guilty of laches	13
Conclusion	15

CASES CITED

	PAGE
Alsop v. Riker, 155 U. S. 448	7
Ball et al. v. Gibbs, 118 Fed. (2d) 958	8
Benedict v. City of New York, 250 U. S. 321, 327-8	7
Board of Com'rs v. United States, 308 U. S. 343	10
Broderick v. Aaron, 264 N. Y. 368	12
Christopher's Estate, In re, Ohio App., 35 N. E. 2d 454	9
Clearfield Trust Co. v. United States, 318 U. S. 363	10
Deitrick v. Greaney, 309 U. S. 190	10
D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U. S. 447	10
Erie R. Co. v. Tompkins, 304 U. S. 64	6, 9
Friede v. Jennings, 121 Conn. 220	9
Friede v. Sprout, 294 Mass. 512	9
Godden v. Kimmell, 99 U. S. 201	7
Guaranty Trust Company of New York v. York, decided by the Supreme Court of the United States June 18, 1945	5, 7, 8, 9, 10, 11
Hammond v. Hopkins, 143 U. S. 234	14
Hohnberg v. Anchell, 24 Fed. Supp. 594	11
Kirby v. Lake Shore & M. S. Co., 120 U. S. 130	11
Naylor v. Foreman-Blades Lumber Co., 230 Fed. 658	14
O'Brien v. Western Union Telegraph Co., 113 F. (2d) 539	10

PAGE

Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U. S. 342 15

Overfield v. Pennroad Corp., 146 Fed. (2d) 889 8

Partridge v. Ainley, 28 F. Supp. 472 11

Roos v. Texas Co., 126 Fed. (2d) 767 8

Russell v. Todd, 309 U. S. 280 ..... 5, 7, 8

STATUTES CITED

New York Civil Practice Act, Section 53 5

Judicial Code, Section 240(a) 2

U. S. Code, Title 12, Chapter 7, Section 812 2

Supreme Court of the United States

OCTOBER TERM, 1945

No. .....

GEORGE C. HOLMBERG, FRANK C. BALL, CARL J. EASTERBERG, GEORGE F. HARDIE and PAT B. MORRIS, on behalf of themselves and all other creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis,

Petitioners and Appellees below,

vs.

CHARLES ARMBRECHT and GILBERT MILLER, BARBARA RICHARDS MICHEL, MURIEL RICHARDS PERSHING and DOROTHY RICHARDS HIRSHON, as Executors under the Last Will and Testament of JULES S. BACHE, deceased,

Respondents and Appellants below.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR DEFENDANTS IN OPPOSITION

Opinions Below

The opinion of the United States District Court for the Southern District of New York (R. 99) was rendered on November 1, 1944. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 113) was rendered on July 13, 1945. Official citation is not yet available.

Jurisdiction

The judgment herein was entered on July 13, 1945 (R. 122). No petition for rehearing was filed. The petition for a writ of certiorari was filed on October 12, 1945. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented

1. Did the Circuit Court of Appeals for the Second Circuit err in its conclusion that a federal court in equity is bound by the state ten-year statute of limitations which would be applied if the present question were presented to a New York State court?

2. Assuming that the doctrine of laches is applicable, should not the District Judge have found that the petitioners were guilty of laches?

Statement

The petitioners and appellees below, as creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis (hereinafter called the "Bank"), sued in November, 1943, to recover an assessment against Charles Armbrecht and Jules S. Bache as shareholders of the Bank to the extent of 100% of the par value of their shares, pursuant to Title 12, Chapter 7, Section 812,* U. S. Code.

---

* This section reads as follows:

"§ 812. *Individual liability of shareholders.* Shareholders of every joint-stock land bank organized under this chapter shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such bank to the extent of the amount of stock owned by them at the par value thereof, in addition to the amount paid on and represented by their shares."

The Bank failed on May 2, 1932. Armbrecht was then the record owner and Bache was the beneficial owner of 100 shares of the Bank (R. 19). This action was commenced on November 17, 1943, that is, more than eleven years and six months after the cause of action accrued (R. 1). Jules S. Bache died on March 24, 1944. Gilbert Miller, Barbara Richards Michel, Muriel Richards Pershing and Dorothy Richards Hirshon, as executors under the will of Jules S. Bache, were substituted for him as parties defendant (R. 18).

In January, 1944, this action was consolidated with another action (hereinafter called "Action No. 1") commenced by these petitioners on May 2, 1942, in respect of the same shares and for similar relief against Charles Armbrecht and the brokerage firm of J. S. Bache & Co. The only defendant served was Morton F. Stern, a partner of said firm. The alleged service of the summons and complaint on Armbrecht was quashed by the District Court in October, 1943 (R. 11, 44). Action No. 1 proceeded on the theory that the firm of J. S. Bache & Co. was the beneficial owner of said shares. This action, however, proceeds upon the theory that Jules S. Bache was the beneficial owner of the shares, which was admitted by the answer (R. 14). The defendants pleaded the New York statute of limitations and laches in separate defenses (R. 16).

The two actions were tried together. In Action No. 1 the complaint as to Stern was dismissed on the ground that the firm of J. S. Bache & Co. had no interest in the shares at the time the Bank failed (R. 2). No appeal was taken from such dismissal.

The shares in question (transferred from shares standing in the name of J. S. Bache & Co. from 1924 and 1925) were issued at the request of J. S. Bache & Co. in the name of its nominee Armbrecht on January 20, 1928 (R. 80, 81, 90-98). It appeared from the only available records of J. S. Bache & Co., earlier records having been destroyed, that these shares were carried in the individual margin or

long account of Jules S. Bache, as security therefor, between October, 1931 and January, 1933 (Finding of Fact 2, R. 100, 101).

In proceedings in the District of Minnesota, it was held on April 20, 1935, that an assessment of 100% against the Bank's stockholders was necessary. Thereafter and prior to March, 1936, proceedings were instituted in New York, resulting in the appointment of Irving S. Friede as Ancillary Receiver of the Bank, to enforce the decree of the Minnesota Court against stockholders of the Bank resident in New York (R. 33, 35). Friede, as such Receiver, sued Armbrecht, who was served with process in August, 1936, but before judgment was entered against him, Friede's appointment as Ancillary Receiver was nullified (R. 37). In April, 1937, in a new bill of complaint Armbrecht was again named as one of many defendants, but he was never served (R. 38), although he was then living in the Bronx and had been since 1905 (R. 77) and was a weekly visitor at the office of J. S. Bache & Co., then at 42 Broadway, New York City (R. 71).

For more than four years, viz., from August, 1937, until December, 1941, or January, 1942, neither petitioners nor their counsel did anything to enforce the liability of defendant Armbrecht (R. 52). Then, as stated above, Action No. 1 was commenced on May 2, 1942. While petitioners' counsel stated that Action No. 1 against J. S. Bache & Co. was only for the purpose of discovery and inspection (R. 62) the claim was pressed to the very end, and this also despite the fact that the Bank's records showed that each certificate of stock (Defts.' Exs. A, B and C, 90-98) which had been surrendered to the Bank by J. S. Bache & Co. in 1928 for transfer to the name of Charles Armbrecht had stamped thereon a notation that the transfer was made to Armbrecht's name solely to complete a purchase for their customer and that J. S. Bache & Co. had no ownership or interest therein (R. 92, 95, 98).

In September, 1942, defendant Stern, during his examination before trial by petitioners' counsel, testified that

the firm of J. S. Bache & Co. had no ownership, beneficial or direct, in the shares and that Jules S. Bache was the beneficial owner thereof at the time the Bank failed. No attempt was made, however, to have Jules S. Bache served as a party defendant until the instant action was started in November, 1943, viz., thirteen and one-half months after Stern so testified, and approximately eleven years and six months after the cause of action arose (R. 58).

Contrary to petitioners' assertion, there is not one iota of evidence in the record that Armbrecht and Bache, or either of them, at any time did or omitted to do any act or thing, fraudulent or otherwise, to prevent petitioners from instituting suit, nor is there a finding of fact that defendants were guilty of inequitable conduct.

The District Court rendered judgment in favor of petitioners and against defendants for $10,000. On appeal to the United States Circuit Court of Appeals for the Second Circuit, the judgment was reversed (R. 113-121). The Circuit Court, relying upon *Guaranty Trust Company of New York* v. *York*, decided by the Supreme Court of the United States June 18, 1945, and *Russell* v. *Todd*, 309 U. S. 280, held that the ten-year New York State statute of limitations (Section 53 of the Civil Practice Act) was binding upon a federal court sitting in equity, and that an action brought over eleven and one-half years after accrual of the cause of action could not succeed.

Summary of Argument

Point I

The decision of the Circuit Court that petitioners' claim is barred by the New York statute of limitations is not in conflict with rulings of the Supreme Court. On the contrary, it is in accord with its expressed view and with the rule of the majority of federal decisions that federal courts of equity must apply state statutes of limitations

even in actions to enforce rights arising under federal statutes, provided there is no conflict with the federal statute involved.

Adherence to this rule is required equally with respect to cases arising under a federal statute and diversity cases, both for the sake of uniformity in the enforcement of litigants' rights and consistency in the application of *Erie R. Co.* v. *Tompkins*.

Contrary to the assertion of petitioners, there was no finding by the trial court that defendants were guilty of inequitable conduct, but even had there been such a finding, the above rule applies.

Point II

Assuming the doctrine of laches is applicable, the trial court erred in finding that petitioners were not guilty of laches. On the contrary the evidence showed unreasonable delay on the part of petitioners, to the prejudice of defendants, and the trial court should have so found.

ARGUMENT

POINT I

The New York Ten-Year Statute of Limitations is conclusive herein.

Petitioners assign as reasons for the issuance of a writ of certiorari to the Circuit Court error on an important question of law and probable conflict with applicable decisions of this Court. They contend that the applicable state statute of limitations is not binding on the federal court dealing with rights arising under a federal statute. The rejection of this contention by the lower court is so clearly correct that a review by this Court is, we submit, not warranted.

(a) The decision below is correct.

The Supreme Court has unmistakably expressed its view that the mere fact that an action arises under a federal statute does not warrant the violence to uniform procedure that is implicit in petitioners' contention.

As stated by the Circuit Court in its opinion (R. 120):

> "In enforcing legal rights under a federal statute state limitations statutes have always been applied as in proceedings to enforce private rights under the anti-trust laws, *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U. S. 390, Holmes, J.; *cf. Momand* v. *Universal Film Exchange*, D. C. Mass., 43 F. Supp. 996, 1008, Wyzanski, J.; *Hansen Packing Co.* v. *Swift & Co.*, D. C. S. D. N. Y., 27 F. Supp. 364, Galston, J.; or for the infringement of patents, *Campbell* v. *City of Haverhill*, 155 U. S. 609; or for the statutory liability of a shareholder in a national bank, *McDonald* v. *Thompson*, 184 U. S. 71; *Rawlings* v. *Ray*, 312 U. S. 96."*

These decisions render meaningless any distinction that might be asserted, predicated upon the ground that the rights here involved arose under a federal statute, and the decision in *Guaranty Trust Co.* v. *York* further renders meaningless any distinction based upon the fact that the action arises in equity rather than law. This Court has expressed its views with respect to a situation where there was the concurrence of a federally created right with equity in *Russell* v. *Todd*, 309 U. S. 280, 293, where the same statute as is involved here, was the basis of the action. This Court there stated:

> "We take it that in the absence of a controlling act of congress federal courts of equity, in enforcing rights arising under statutes of the United States, will without reference to the Rules of Decision Act adopt and

---

*See also: *Guaranty Trust Company of New York* v. *York*, decided by the Supreme Court of the United States June 18, 1945, p. 12, printed copy of opinion, citing *Godden* v. *Kimmell*, 99 U. S. 201; *Alsop* v. *Riker*, 155 U. S. 448; *Benedict* v. *City of New York*, 250 U. S. 321, 327-8.

apply local statutes of limitations which are applied to like causes of action by the state courts. *Cf. Mason v. United States*, 260 U. S. 545; *Jackson County v. United States*, 308 U. S. 343."

Russell v. *Todd* was followed by the United States Circuit Court of Appeals for the Eighth Circuit, in *Ball et al.* v. *Gibbs*, 118 Fed. (2d) 958 (April 9, 1941), a case also involving the same statute as here and where the facts are strikingly similar to those in the present action. See also *Roos v. Texas Co.* (5th Circuit), 126 Fed. (2d) 767, and *Overfield* v. *Pennroad Corp.* (3rd Circuit), 146 Fed. (2d) 889.

The policy running through all of these cases is uniformity—a policy as essential in the adjudication of federal rights as it is in state rights. As a practical matter, uniformity on questions of the appropriate periods of limitation, said in *Guaranty Trust Co.* v. *York* to be best served in diversity cases by adherence to applicable state statutes of limitations, can only be attained in cases under a federal statute by similar adherence to state statutes of limitations.

Petitioners argue that uniformity in the latter cases can only be accomplished by a separate federal rule of laches. It is obvious, however, that the argument is not applicable to the problem of appropriate periods of limitation. Far from creating uniformity, a federal rule of laches would reinstate the chaos and confusion that the decision by this Court in the *York* case has set to rest. Under the laches rule, litigants' rights would be subject to innumerable variations, depending upon the particular instincts of the trial judge. For the sake of uniformity, therefore, it would be infinitely more desirable that the applicable state period of limitations be made conclusive in every case, placing all litigants on an equal footing in each state.

This is particularly true in view of the holding of the *York* case that limitations go to the substantive rights of the parties. A contrary result would give rise to the anomaly in the federal system of diverse rules of federal prac-

tice with respect to the conclusiveness of state substantive law in a federal court, echoing the confusion of the period prior to *Erie R. Co.* v. *Tompkins*.

Petitioners, we submit, cannot successfully dispute the logic of this argument, nor have they attempted to deny the force of the cases discussed above which bear it out in result. They take issue only with the Circuit Court's reliance on *Guaranty Trust Co.* v. *York* in support of this result. They do not, and could not, take the position that the *York* case is contrary to the above authorities. Their position is, rather, that it has been extended unwarrantedly by the Circuit Court, in that it only expressed the rule to be applied where the federal court is sitting because of diversity, whereas, so petitioners say, the case at bar presents the entirely different situation of a federal court sitting because the claim is created by federal statute. This distinction is non-existent, because here the jurisdiction of the federal court rests both on the fact that the action was one to enforce a right created by federal statute and the fact that the matter in controversy is between citizens of different states (R. 4). In fact, as stated by the Circuit Court, "the assessment authorized by this statute is enforceable in state courts", citing *Friede* v. *Jennings*, 121 Conn. 220, 184 A. 369; *Friede* v. *Sprout*, 294 Mass. 512, 2 N. E. 2d 549; *In re Christopher's Estate*, Ohio App., 35 N. E. 2d 454 (R. 120-121).

Petitioners rest heavily on the fact that this Court in the decision of the *York* case expressly ruled out of its considerations questions relevant to the disposition of a claim based on federal law. It seems hardly necessary to point out that, in so doing, this Court did not impugn the authorities discussed above. What is more significant, this Court, in rendering its decision in the *York* case, was not placing to one side *all* cases involving claims based on federal law, but only those cases where the federal statute in issue contained a period of limitation inconsistent with that of the

state law, as the Circuit Court well recognized.* The rule of the latter cases would, of course, be irrelevant in deciding a matter such as *Guaranty Trust Co.* v. *York;* but as the litigation at bar involves no conflicting federal statute of limitation, it is not distinguishable from the *York* case as including questions of the type which this Court expressly put to one side.

(b) State statutes of limitations may not be disregarded whenever federal courts think that the result of following them may be inequitable.

While conceding that ordinarily federal courts sitting in equity will apply state statutes of limitations, at least by analogy, petitioners argue that where defendants were found guilty of inequitable conduct, the rule that laches will not be invoked against the plaintiffs until the defendants are discovered should apply. As we hereafter point out, there was no proof of any fraud and no finding below that the defendants here were guilty of inequitable conduct, nor could there be from the record. But more than that, implicit in petitioners' statement is the argument that in certain cases a federal court can vary from the state statue. If there ever was a proposition that a federal equity court could ignore a state statute of limitations because of the inequitable result, due if you will to a defendant's inequitable conduct, it is, as the Court below recognized, the law no longer. In the *York* case, this Court noted that "there was talk of freedom of equity from such state statutes of limitations", but remarked that "before the true source of law that is applied by the federal courts

---

* The cases cited were: *Board of Com'rs* v. *United States*, 308 U. S. 343; *Deitrick* v. *Greaney*, 309 U. S. 190; *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363; *O'Brien* v. *Western Union Telegraph Co.*, 1 Cir., 113 F. (2d) 539. As stated by Judge Clark in his opinion below (R. 118):

> "These cases, based on federal enactments, state no more than the obvious principle that a rule of state law will be disregarded by a federal court, when inconsistent with the federal statute governing the case before it."

under diversity jurisdiction was fully explored, some things were said that would not now be said". This loose talk, continued this Court, merely reflects "notions that have been replaced by a sharper analysis". Noting that there was one old case, *Kirby* v. *Lake Shore & M. S. Co.*, 120 U. S. 130, in which the Supreme Court did disregard a state statute of limitations when the court deemed it inequitable to apply it, this Court decided in the *York* case that the *Kirby* case "needs to be rejected", citing with approval the following quotation from the dissenting opinion of Judge Augustus N. Hand below:

> "In my opinion it would be a mischievous practice to disregard state statutes of limitations whenever federal courts think that the result of adopting them may be inequitable."

The only authority offered by petitioners in support of their contention is a statement of the late Judge Woolsey in *Holmberg* v. *Anchell*, 24 Fed. Supp. 594, at 603. There, however, the facts showed a deliberate and fraudulent intent on the part of certain defendants to avoid liability by hiding behind a corporation which they had created for the purpose. In a later case, however, *Partridge* v. *Ainley*, 28 Fed. Supp. 472, at 476—also an action against stockholders of a joint stock land bank—Judge Woolsey expressed his opinion that a federal court in a cause of equitable cognizance, sitting in a state where there is a statute of limitations applicable to equity actions, could no longer apply the doctrine of laches after the enactment of the new rules of federal procedure, in effect September 16, 1938.

Furthermore, petitioners' rest their contention upon the assertion that the trial court "found as a fact that the defendants were found guilty of inequitable conduct" (Petitioners' Brief, p. 7). There is no such finding in the record and none could have been made from the evidence. Although the trial ~~court~~ judge did by inference in his decision, without a finding of fact, seek to create the im-

pression that Bache was guilty of inequitable conduct, he based his statements on his erroneous finding that the stock was placed by Bache in Armbrecht's name in 1931, whereas the undisputed documentary proof in the record shows it was placed in Armbrecht's name by J. S. Bache & Co. in January, 1928, at a time when there was no reason to suspect the imminent possibility of double liability. The trial court found that J. S. Bache & Co. acted only as broker, both in securing the issuance of the stock to Armbrecht and as pledgee of the stock in maintaining a margin account for Jules S. Bache (R. 101), and at the trial expressed itself as thoroughly familiar with the well-established Wall Street custom of holding stock as collateral in the name of a nominee (R. 78-79). Defendants were under no duty to have the stock registered in Bache's name. The rule is concisely stated by the Court of Appeals in *Broderick* v. *Aaron*, 264 N. Y. 368 (377). "There is no duty upon a buyer to register a transfer of stock upon the corporate books, and no obligation arises upon equitable grounds for failure to make such a transfer." The trial court recognized this as sound law at the trial, commenting thereon as follows (R. 68):

> "That is what I think would be sound law. There must be any number of reasons that a man can give readily for carrying stock in a name other than his own."

The trial court, however, in its opinion argues from its said erroneous finding as to date, that why Bache put the stock in Armbrecht's name is immaterial; that when he used Armbrecht's name as a dummy for his own purpose Bache forsook any claim to later damage for failure to recognize him as a defendant earlier and that claim now comes with bad grace, and that Armbrecht, because he did nothing to meet his alleged liability or to pass it on to the shoulders of the beneficial owner, even though that owner was in some sense his patron, indicates, if anything, that he willingly lent himself to Bache's escape.

All these inferences and assumptions must fall in the light of the indisputable record that the stock had been in Armbrecht's name for several years before the record shows Bache owned it. Bache could not, of course, escape liability because the stock was in a name other than his own, as the trial court well realized (R. 68); yet he wandered off into the realm of assumption and inferred wrongdoing where the record showed none existed. We submit, therefore, that on the record there is lacking any evidence of inequitable conduct on the part of Bache or Armbrecht to warrant this Court in applying the rule of laches contended for by petitioners.

POINT II

Assuming that the doctrine of laches is applicable, the trial court should have found that the petitioners were guilty of laches.

In view of the conclusion of the Circuit Court that the New York statute of limitations barred the action, that Court did not decide the question of the laches of the petitioners (R. 117). It becomes important on this application only if this Court be inclined to rule that a writ of certiorari should be granted.

Briefly stated we contend that petitioners' unexplained delay in proceeding against Armbrecht from August, 1937, to January, 1942, and the delay for thirteen months after September, 1942, to proceed against Jules S. Bache was wholly unwarranted. No explanation for this long delay was given or offered at the trial and no attempt was made in any respect to excuse it.

Petitioners' contention below that it necessarily took them more than eleven years to find out that Jules S. Bache was the beneficial owner of the stock is completely without merit, for reasons that are unnecessary to state at this time.

In any event, there is no excuse in the record for petitioners' failure to proceed against Jules S. Bache for more than thirteen months after they learned in September, 1942, that he was the beneficial owner of the stock.

This delay was prejudicial to the defendants. The complaint herein did not contain all the allegations necessary in an action for fraud and deceit and it therefore was apparent under the decisions that based on this theory the petitioners could not succeed. Bache, therefore, had every reason to believe and to rely on the fact that there was nothing for him to do except to await the trial.

No amended complaint was ever served and the theory of the complaint was never changed until the trial, several months after Bache's death. Then the charge that Jules S. Bache had been guilty of fraud, upon which the complaint was framed, was dropped and the case was tried upon the theory that Bache aided by Armbrecht's failure to meet his liability by some obligatory affirmative act, the nature of which is not stated, had been guilty of inequitable conduct by continuing after acquiring the stock to hold it in his margin account in the name of Armbrecht to avoid detection as the real owner.

It is a well established principle that the rule of laches is especially to be enforced where the right to relief is based on the alleged fraud of a person who had died (*Naylor* v. *Foreman-Blades Lumber Co.*, 230 Fed. 658; *Hammond* v. *Hopkins*, 143 U. S. 234). The rule generally applies in cases where the person charged with inequitable conduct died before the institution of the suit. But we can find no reason why the same rule should not apply in the present case in which the contention that Bache was guilty not of fraud but of inequitable conduct was for the first time advanced after he was dead. His death, therefore, coming as it did so soon after the case was at issue, prevented the defendants from meeting the claim that his conduct was inequitable in that they were unable to adduce any proof to meet a claim never advanced while he was alive.

Owing to the loss of records due to petitioner's long lapse of time in bringing the action, defendants were also prevented from establishing when Jules S. Bache acquired the stock. The importance that the trial court below placed upon the time when Jules S. Bache acquired the stock is shown by the significance the trial court attached to the erroneous findings that he acquired it in 1931 and then caused it to be placed in Armbrecht's name. J. S. Bache & Co. had in 1937 or 1938 destroyed all its records of transactions prior to 1931 (R. 74). See *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342, at 348-49.

Defendants were thus prejudiced by the long delay and the trial court erred in not finding petitioners guilty of laches.

CONCLUSION

The decision below is correct and no conflict exists. We respectfully submit that the petition for a writ of certiorari should be denied.

Dated, New York, November 7, 1945.

Respectfully submitted,

CHESTER ROHRLICH,
Counsel for Defendants.

EDGAR M. SOUZA,
STANLEY GOLDSTEIN,
ALVIN D. LURIE,
of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 505

GEORGE C. HOLMBERG, FRANK C. BALL, CARL J. EASTERBERG, GEORGE F. HARDIE and PAT B. MORRIS, on behalf of themselves and all other creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis,

Petitioners,

vs.

CHARLES ARMBRECHT and GILBERT MILLER, BARBARA RICHARDS MICHEL, MURIEL RICHARDS PERSHING and DOROTHY RICHARDS HIRSHON, as Executors under the Last Will and Testament of JULES S. BACHE, deceased,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

EDGAR M. SOUZA,
Counsel for Respondents.

ALVIN D. LURIE,
of Counsel.

INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATEMENT	2
SUMMARY OF ARGUMENT	7
ARGUMENT:	
I—The New York ten-year statute of limitations is conclusive herein and bars the suit	8
(a) Rulings of this Court	8
(b) The rationale of the doctrine of uniformity	13
(c) Absence of inequitable conduct	17
(d) The arguments of petitioners and the amici curiae have failed to meet the issue	19
(e) The state statute controls if only by analogy	26
II—Assuming that the doctrine of laches is pertinent, the district court should have found that the petitioners were guilty of laches	27
III—The question as to the date of accrual of the cause of action cannot properly be considered by this Court	33
CONCLUSION	41

CASES CITED

PAGE

Adolf Gobel, Inc. v. Hammerslough, 263 App. Div. 1, aff'd 288 N. Y. 653 ..... 22n

Alsop v. Riker, 155 U. S. 448 ..... 9n

Bailey v. Glover, 21 Wall. 342 ..... 10n, 21, 22, 23, 24, 25n, 26

Ball, et al. v. Gibbs, 148 Fed. (2d) 958 ..... 10, 19, 27, 37

Benedict v. City of New York, 250 U. S. 321 ..... 9n

Blair v. Oesterlein Machine Co., 275 U. S. 220 34

Brick v. Cohn-Hall-Marx Co., 276 N. Y. 259 ..... 22n

Broderick v. Aaron, 264 N. Y. 368 ..... 6, 18, 22n

Brusselback v. Cago Corp., 24 Fed. Supp. 524 37

Burnet v. Commonwealth Improvement Co., 287 U. S. 415 34

Buttles v. Smith, 281 N. Y. 226 ..... 22n

Campbell v. City of Haverhill, 155 U. S. 610 12

Carr v. Thompson, 87 N. Y. 160 ..... 22n

Christopher v. Brusselback, 302 U. S. 500 ..... 36, 38, 39

Christopher's Estate, In re, Ohio App. 35 N. E. (2d) 454 ..... 37, 40n

Clarke v. Gilmore, 149 App. Div. 445 22

Clearfield Trust Co. v. United States, 318 U. S. 363 ..... 15, 16n

Crown Cork & Seal Co. v. Ferdinand Gutmann Co., 304 U. S. 459 34

Curacao Trading Co., Inc. v. Wm. Stake Co., 2 Fed. Rules Dec. 308 ..... 22n

Deitrick v. Greaney, 309 U. S. 190 25

PAGE

Dodds v. McColgan, 229 App. Div. 273 22

D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U. S. 447 ..... 15, 25, 26

Downey v. Palmer, 32 Fed. Supp. 344 21

Druckerman v. Harbord, et al., 31 N. Y. S. (2d) 867 ..... 22n

Durrance v. Collier, 81 Fed. (2d) 4 ..... 22n

Elder v. New York & Penn. Motor Express Co., 284 N. Y. 350 36

Erie R. Co. v. Tompkins, 304 U. S. 64 ..... 8, 13, 14, 15, 17, 24

Exploration Co. v. United States, 247 U. S. 435 ..... 21, 22n, 25, 27

Fisher v. Whiton, 317 U. S. 217 ..... 9n

Forrest v. Jack, 294 U. S. 158 ..... 22n

Friede v. Jennings, 184 Atl. 369 (Conn.) 16n

Friede v. Sprout, 2 N. E. (2d) 549 (Mass.) 16n

General Talking Pictures Corp. v. Western Electric Co., 304 U. S. 175 34

Glover v. National Bank of Commerce, 156 App. Div. 247 ..... 22n

Godden v. Kimmel, 99 U. S. 201 ..... 9n

Good Health Dairy Products Corp. v. Emery, 275 N. Y. 14 36

Grant v. A. B. Leach & Co., Inc., 280 U. S. 351 28

Grossbeck v. Morgan, 206 N. Y. 385 27

Guaranty Trust Co. of New York v. York, 89 L. Ed. 1418 ..... 8, 9, 9n, 13, 14, 15n, 17, 20, 23

Gunning v. Cooley, 281 U. S. 90 34

Halbert v. United States, 283 U. S. 753 35

PAGE

Hall v. Ballard, 90 Fed. (2d) 939 ..... 27, 38, 40

Hammond v. Hopkins, 143 U. S. 224 31

Hearn 45 St. Corp. v. Janow, 283 N. Y. 139 ..... 22n

Holmberg, et al. v. Anchell, 24 Fed. Supp. 594 ..... 4, 11, 30, 33, 35-6, 37

Holmberg v. Carr, 86 Fed. (2d) 727 ..... 28, 39

Holmberg, et al. v. Southern Minnesota Joint Stock Land Bank of Minneapolis, et al., 10 Fed. Supp. 795 ..... 3n, 33, 35, 37

Husty v. United States, 282 U. S. 694 34

Johnson v. Manhattan Railway Co., 289 U. S. 479 34

Kirby v. Lake Shore & Michigan Southern Railway, 120 U. S. 130 ..... 10n, 21, 23, 27

Krauthoff v. Kansas City Joint Stock Land Bank, 31 Fed. (2d) 75 36

Liberty Oil Co. v. Condon National Bank, 260 U. S. 235 28

Lynch v. United States, 292 U. S. 571 34

Meader v. Norton, 11 Wall. 442 ..... 10n

Michoud v. Girod, 4 How. 503 ..... 10n

Minnich v. Gardner, 292 U. S. 48 34

Nasaba Corp. v. Harfred Realty Corp., 287 N. Y. 290 ..... 22n

Naylor v. Foreman Blades Lumber Co., 230 Fed. 658 31

Ohio Valley National Bank v. Hulitt, 204 U. S. 162 ..... 22n

Olson v. United States, 292 U. S. 246 34

Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U. S. 342 32

Overfield v. Pennroad Corp., 146 Fed. (2d) 889 11

PAGE

Owens v. Union Pacific R. Co., 319 U. S. 715 28

Partridge v. Ainley, 28 Fed. Supp. 472 11

Partridge v. Ainley, 24 Fed. Supp. 43 39

Pauly v. State Loan & Trust Co., 165 U. S. 606 ..... 22n

Pine River Logging & Improvement Co. v. United States, 186 U. S. 279 34

Pusey & Jones Co. v. Hanssen, 261 U. S. 491, rev'g 279 Fed. 488 28

Robinson & Co. v. Belt, 187 U. S. 41 34

Roos v. Texas Co., 126 Fed. (2d) 767 10

Rorick v. Devon Syndicate Ltd., 307 U. S. 299 34

Russell v. Todd, 309 U. S. 280 ..... 9, 10, 20, 36, 37

Schram v. Keane, 279 N. Y. 227 ..... 14n, 17n

Sonzinsky v. United States, 300 U. S. 506 34

Swift v. Tyson, 16 Pet. 1 16

Thompson v. Magnolia Petroleum Co., 309 U. S. 478 16

Todd v. Russell, 104 Fed. (2d) 169 ..... 17n

Webster Elec. Co. v. Splitdorf Elec. Co., 264 U. S. 463 34

Wheeler v. Green, 280 U. S. 49 38

Wickes Boiler Co. v. Godfrey-Keeler Co., 116 Fed. (2d) 842, revd. 121 Fed. (2d) 415, cert. den. 314 U. S. 686 ..... 16n

OTHER AUTHORITIES CITED

PAGE

Clark, J., Lecture on State Law in the Federal Courts, Vol. 114, No. 129, N. Y. L. J. 1575, at 1576, Col. 7 ..... 15n, 16n, 17n

2 Carmody, N. Y. Prac. (1930), Secs. 409, 411 27

12 Cycl. Fed. Pro. (2nd Ed.), p. 347 35

STATUTES CITED

Federal Reserve Act, Sec. 123, 12 U. S. C. A., Sec. 264(j) ..... 14n[6]

Federal Rules of Civil Procedure, 28 U. S. C. A. following Sec. 723c 11

12 U. S. C., Sec. 65 ..... 16n, 38

U. S. Code, Title 12, Sec. 812 21

N. Y. Civil Practice Act, Sec. 48, subdiv. (5) 22, 23

U. S. Code, Title 12, Sec. 963 33

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 505

GEORGE C. HOLMBERG, FRANK C. BALL, CARL J. EASTERBERG, GEORGE F. HARDIE and PAT B. MORRIS, on behalf of themselves and all other creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis,

Petitioners,

vs.

CHARLES ARMBRECHT and GILBERT MILLER, BARBARA RICHARDS MICHEL, MURIEL RICHARDS PERSHING and DOROTHY RICHARDS HIRSHON, as Executors under the Last Will and Testament of JULES S. BACHE, deceased,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

Opinions Below.

The opinion of the United States District Court for the Southern District of New York (R. 99) was rendered on November 1, 1944 and has no official citation. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 113) was rendered on July 13, 1945 and is reported in 150 Fed. 2d 829.

Jurisdiction

The judgment herein was entered on July 13, 1945 (R. 122). No petition for rehearing was filed. The petition for a writ of certiorari was filed on October 12, 1945. Certiorari was granted November 19, 1945. The jurisdiction of this Court rests upon Section 240(a) of the Judicial Code, 28 U. S. C., paragraph 347(a), as amended by the Act of February 13, 1925.

Questions Presented

1. Did the Circuit Court of Appeals for the Second Circuit err in its conclusion that, in the adjudication of private rights federally created, a Federal court in equity is bound by the state ten-year statute of limitations which would be applied if the present question were presented to a New York State court?

2. Assuming that the doctrine of laches is pertinent, should not the district court have found that the petitioners were guilty of laches?

Statement

Error in petitioners' brief in their Statement of the Case in respect of facts stated to have been found by the district court and the omission of pertinent facts from such Statement, as well as the erroneous assumption in the briefs filed amici curiae on behalf of the Trustees of Central States Electric Corporation and the United States that the respondents were found guilty of inequitable conduct, impels a further statement here.

The cause of action herein accrued May 2, 1932. The district court in its first finding of fact found that

> "1. Plaintiffs were, on the second day of May, 1932, and still are creditors of the Southern Minnesota Joint

Stock Land Bank of Minneapolis which was closed on that day and was insolvent with an excess of liabilities over assets greater than $3,000,000—more than the par value of all the issued stock." (R. 100) [1]

The above finding is in accord with the findings of fact and conclusions of law in the original action against the stockholders of the Bank brought in July, 1932 by these same petitioners in the United States District Court, District of Minnesota. There the district court found as a fact that on May 2, 1932, the Southern Minnesota Joint Stock Land Bank of Minneapolis was and since that date had been and, at the date of the finding, still was insolvent with the amount of its outstanding contracts, debts and engagements on May 2, 1932, exceeding the fair value and market value of its assets by more than $3,000,000.[2] Said district court also found as a conclusion of law that each stockholder of said Bank was on May 2, 1932 and thereafter liable to the creditors of the Bank in the amount of the par value of the shares of stock so held by him.[3]

---

[1] The par value of the outstanding capital stock of the Bank was $3,000,000 (R. 7).

[2] *Holmberg et al.* v. *Southern Minnesota Joint Stock Land Bank of Minneapolis et al.*, 10 Fed. Supp. 795. The finding is as follows: "X. That on May 2, 1932, defendant Southern Minnesota Joint Stock Land Bank of Minneapolis was, and at all times since has been, and now is, insolvent and unable to meet its obligations; that the amount of its outstanding contracts, debts and engagements on May 2, 1932, exceeded the fair value and market value of its assets by more than $3,000,000; and that said deficit has constantly and steadily increased since May 2, 1932, and is still constantly increasing" (p. 797).

[3] This conclusion of law is as follows: "1. That each stockholder of the defendant Southern Minnesota Joint Stock Land Bank of Minneapolis was on May 2, 1932, and at all times since, and is at the present time, liable to the creditors of the defendant Southern Minnesota Joint Stock Land Bank of Minneapolis in the amount of the par value of the shares of stock so held by him in said defendant Southern Minnesota Joint Stock Land Bank of Minneapolis; that an assessment should be made, declared and levied upon and against each and every such person in the amount of 100% of the stock so held by each stockholder" (Id., p. 798).

In *Holmberg* v. *Anchell*, 24 Fed. Supp. 594 at 601, the late United States District Judge John Munro Woolsey held in respect of the cause of action of these petitioners that "the cause of action accrued and the plaintiffs must be deemed to have been aware of their right to sue stockholders at least by July 28, 1932, when they began their suit in Minnesota."

The record shows a definite lack of diligence on the part of the petitioners. Respondent Charles Armbrecht since 1905 has resided continuously in the Bronx, City of New York (R. 77). After his retirement, about 1933, he was a weekly visitor to the office of J. S. Bache & Co. (R. 70-71; Finding of Fact 1, R. 100). It is not claimed that he ever concealed his whereabouts or attempted to avoid service of process.[4] Yet for more than four years—from August, 1937 to December, 1941 or January, 1942—petitioners did absolutely nothing to enforce his liability (R. 52). Petitioners admittedly knew from the Bank's records that Armbrecht's address was c/o J. S. Bache & Co. but no inquiries were made of that firm to ascertain his connections therewith or to obtain a better address (R. 58, 59). Finally, to avoid the possible effect of the New York statute of limitations, petitioners' counsel "* * * had to rush it (the lawsuit) through" (R. 53). Then followed a further delay of thirteen and one-half months after defendant Stern testified that Jules S. Bache was the beneficial owner of the stock before the instant action was commenced on November 13, 1943, more than eleven years and six months after the cause of action accrued.

The records of J. S. Bache & Co. for the period prior to October, 1931 (not 1935 as found by the district court) were destroyed in 1937 or 1938 (R. 74). As a result, respondents were unable at the trial to show under what circumstances and when the stock was obtained by Jules S. Bache and became security in his margin account with said firm (R. 72, 73, 74).

---

[4] Armbrecht was served in the Friede action on August 13, 1936 at his home in the Bronx (R. 37; Finding of Fact 4, R. 101).

There is no finding as a fact by the district court as stated by the petitioners, at page 9 of their brief, that Charles Armbrecht was used as a "dummy" by Jules S. Bache and that laches could not be invoked by respondents who were in hiding until they were discovered by petitioners. While the district court in its opinion implied that Bache used Armbrecht as a dummy by stating "when" he did so, there is no finding of fact to that effect. Moreover, the district court's opinion leaves no doubt that the inferences which it drew therein were unquestionably based upon the clearly erroneous finding that the stock had been transferred to Armbrecht's name by Bache in October, 1931.[5]

Petitioners also assert, at page 9 of their brief, that the district court found as a fact that respondents were guilty of inequitable conduct. Again there is no such finding of fact or any such statement in the opinion, nor is there a single iota of evidence in the record which would sustain such finding.

The record is completely void of any act of commission or omission, fraudulent or otherwise, on the part of Armbrecht and Bache or either of them to conceal the ownership of the stock by Bache or to prevent the petitioners from instituting suit. The stock was transferred in January, 1928 from the name of J. S. Bache & Co. to the name of Charles Armbrecht, then one of its regular nominees, employed in the cage (R. 22, 70). Who owned the stock at that time does not appear (R. 74). But in October, 1931, available records showed that it was owned by Jules S. Bache and, while still registered in the name of Charles Armbrecht, was then held in the former's margin account with said firm. This was in complete accord with prevailing Wall Street custom and it would have been very unusual if the stock had been carried in the owner's name

[5] The Circuit Court of Appeals pointed out that the finding of fact that the stock was placed in Armbrecht's name by Jules S. Bache in 1931 is obviously an error, as the documentary records show (R. 116).

(R. 79). The district court not only recognized the custom, but commented that it could almost take judicial notice of the fact that a lot of certificates in Wall Street are not in the names of the real owners (R. 78, 79). While none of the findings of fact of the district court except one was disturbed, the Circuit Court of Appeals, after summarizing the respective claims of the parties as to the facts established by the evidence, expressly declined to pass upon this phase of the matter, saying "Decision of these matters and a fuller recital of the facts bearing upon them become unnecessary, however, in view of our conclusion that the rationale of the *York* case requires the application of the New York statute to this action" (R. 117).

The allegations of the complaint that the transfer to Armbrecht was fraudulent and that Jules S. Bache caused the stock to be placed in the name of Armbrecht as a nominal party or dummy to avoid stockholders' liability were denied by the answer and were wholly unsupported by any evidence at the trial. The district court accepted as sound law the ruling in *Broderick* v. *Aaron*, 264 N. Y. 368, that no obligation rests upon equitable grounds for failure to make a transfer of stock (R. 67, 68), and even remarked that "* * * the mere fact of the carriage of stock in another's name is no evidence of fraud at all, *prima facie*" (R. 68).

Charles Armbrecht was eighty-nine years of age on August 30, 1944 (R. 29). As it is a fair assumption that he must have endorsed the certificates of stock immediately after they were registered in his name in January, 1928, and, as he was a regular nominee of J. S. Bache & Co., it is obvious that no inference of deceit may be derived from his testimony given over sixteen years later, viz., on May 12, 1944 (R. 26)—that he did not remember the transaction. There is no proof in the record as to the financial worth of Armbrecht and all that may fairly be said is that he did not have $10,000 (R. 26). Nor does it appear from the record that Jules S. Bache or any member of the firm of

J. S. Bache & Co. knew or was ever advised of any of the notices stated to have been sent to Armbrecht in respect of the petitioners' claim (R. 104).

Summary of Argument

Point I

The decision of the Circuit Court of Appeals that petitioners' claim was barred by the New York statute of limitations is in accord with the expressed view of the Supreme Court and with the rule of the majority of federal decisions that federal courts of equity must apply state statutes of limitations in actions to enforce rights arising under federal statutes, provided there is no conflict with the federal statute involved.

Adherence to this rule is required equally with respect to cases involving private rights created by federal statute and diversity cases, wherever the federal and state courts exercise concurrent jurisdiction, for the sake of uniformity in the enforcement of litigants' rights.

Contrary to the assertion of petitioners and the assumption as to such fact in the briefs filed amici curiae, there was no finding by the district court that respondents were guilty of inequitable conduct. Even had there been such a finding the above rule applies.

If this Court decrees that state statutes of limitations are not strictly binding on federal courts in the adjudication of private rights federally created, nevertheless, the ten-year period of the New York statute will be applied by federal courts by analogy.

Point II

Assuming the doctrine of laches is pertinent, the district court erred in finding that petitioners were not guilty of laches. The contrary appeared. The record shows un-

reasonable delay on the part of the petitioners, to the prejudice of respondents and the district court should have so found.

Point III

The question now raised for the first time in this case that the cause of action did not accrue until 1935 cannot properly be considered by this Court. On the merits, however, the cause of action arose on May 2, 1932.

ARGUMENT

POINT I

The New York ten-year statute of limitations is conclusive herein and bars the suit.

(a) Rulings of this Court.

In law federal courts were bound by state statutes of limitations even before the decision of *Erie R. Co.* v. *Tompkins* (see *Guaranty Trust Co.* v. *York*, 89 L. Ed. 1418 at 1424). The conclusiveness of such statutes has been extended not only to state created rights at law, but also to rights at law created by federal statutes.

As stated by the Circuit Court of Appeals in its opinion (R. 120):

> "In enforcing legal rights under a federal statute, state limitation statutes have always been applied, as in proceedings to enforce private rights under the anti-trust laws, *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U. S. 390, Holmes, *J.*; cf. *Momand* v. *Universal Film Exchange*, D. C. Mass., 43 F. Supp. 996, 1008, Wyzanski, J., *Hansen Packing Co.* v. *Swift & Co.*, D. C. S. D. N. Y., 27 F. Supp. 364, Galston, *J.*, or for the infringement of patents, *Campbell* v. *City of Haverhill*, 155 U. S. 609, or for the statutory liability of a shareholder in a national bank,

McDonald v. *Thompson*, 184 U. S. 71; *Rawlings* v. *Ray*, 312 U. S. 96."[6]

The argument is made, however, that in *equity* suits federal courts are free to ignore state statutes of limitations. *Guaranty Trust Co.* v. *York* should have silenced this argument.

True, the *York* case was a diversity suit involving state created rights; and admittedly somewhat different principles might apply in respect of federally created rights, such as are involved in the case at bar. This Court, however, in *Russell* v. *Todd*, 309 U. S. 280, had previously decided that federal equity courts in cases involving federally created rights were bound to adopt state statutes of limitations applicable to equity actions. The *Todd* case held that even where a state statute of limitations is one ordinarily applicable to actions at law, if the state courts have applied it to equitable actions, a federal equity court would also apply it. Thus, said the Court at page 293:

> "We take it that in the absence of a controlling act of congress federal courts of equity, in enforcing rights arising under statutes of the United States, will without reference to the Rules of Decision Act adopt and apply local statutes of limitations which are applied to like causes of action by the state courts. Cf. *Mason* v. *United States*, 260 U. S. 545; *Jackson County* v. *United States*, 308 U. S. 343."

While the state statute of limitations was not adopted in the *Russell* case, this was only because it was one solely applicable to actions at law and it did not appear that the state courts had ever applied it to equity suits. As was pointed out, "the Court has not declined to give effect to a state statute shown to be applicable" (Id. p. 294).

---

[6] See also: *Guaranty Trust Co.* v. *York*, 89 L. Ed. 1418, citing *Godden* v. *Kimmell*, 99 U. S. 201; *Alsop* v. *Riker*, 155 U. S. 448; *Benedict* v. *City of New York*, 250 U. S. 321, 327-8. And see: *Fisher* v. *Whiton*, 317 U. S. 217.

The Court's final comment that it had no occasion to consider the *extent* to which federal equity courts are bound to follow state statutes of limitations, certainly was not intended to contradict what had been said before. Having considered at great length the practice of equity courts in the adjudication of state and federal rights to follow state statutes of limitations, the Court did nothing more than to point out that there are possibly certain instances[7] where federal equity courts will not be strictly bound by otherwise applicable state statutes of limitations.

Russell v. *Todd* was followed by the United States Circuit Court of Appeals for the Eighth Circuit, in *Ball et al.* v. *Gibbs*, 118 Fed. (2d) 958, a case on all fours with the one at bar.[8] See also *Roos* v. *Texas Co.* (5th Circuit), 126

[7] The types of instances which the Court apparently had in mind were those involved in the cases cited in the footnote on pages 288, 289 of 309 U. S., that is, cases where the cause of action was based solely on fraud, viz.: *Bailey* v. *Glover*, 21 Wall. 342; *Kirby* v. *Lake Shore & Michigan Southern R. Co.*, 120 U. S. 130; *Michoud* v. *Girod*, 4 How. 503, and *Meader* v. *Norton*, 11 Wall. 442. The effect of these cases on our position will be considered *infra*, page 21 et seq.

[8] In *Ball et al.* v. *Gibbs* creditors of a joint stock land bank sued William D. Gibbs, who was the beneficial owner of bank stock, to enforce his liability under Section 812. Gibbs had owned and held the bank stock in his name from 1926 until April, 1930, when he transferred the shares, without consideration, to his daughter, Jane Gibbs, a minor. On January 7, 1931, on the expectation of being made an officer of the bank, he had Jane retransfer the shares to him. On March 30, 1931, not having been made an officer of the bank, he again transferred the shares to Jane Gibbs and they were registered in her name when the bank was declared insolvent on June 1, 1932. She attained her majority on April 15, 1933. Creditors' actions to enforce the double liability of the stockholders were immediately commenced. Jane Gibbs was served with process but did not appear. After much litigation the plaintiffs on June 15, 1938, brought an equitable action against William D. Gibbs before a federal court in Missouri where there was a five-year period of limitation prescribed in civil actions in respect of an action upon a liability created by a statute other than a penalty or forfeiture. The contentions of the plaintiffs pertinent here were that the action, being exclusively equitable, the Missouri statutes of limitations were inapplicable and that the federal courts should apply the doctrine of

Fed. (2) 767, and *Overfield* v. *Pennroad Corp.* (3rd Circuit), 146 Fed. (2d) 889.

Thus, it is no longer open to question that federal equity courts in the adjudication of federally created rights must apply state statutes of limitations. This conclusion has been fortified by the enactment of the new Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, providing that there should be only one form of civil action. In *Partridge* v. *Ainley*, 28 Fed. Supp. 472, at 476, the Court expressed the opinion that a federal court in a case of equitable cognizance, sitting in a state where there is a statute of limitations applicable to equity actions, would no longer be free to apply its own doctrine of laches after the adoption of the new federal rules.

We believe that disproportionate emphasis has been placed by the petitioners and the amici curiae on the fact that the right instantly in issue was federally created. Joint stock land banks were created as private institutions for the purpose of making profit. *Holmberg* v. *Armbrecht*, 24 Fed. Supp. 594 at 604. The rights which creditors of such banks were given by Congress to enforce a stockholder's double liability are *private rights*. It is not even certain that the enforcement of such rights adequately raises a federal question such as would justify the commencement of suit in a federal court in the absence of diversity,[38] as the Trustees so well recognize (Tr. Br. pp. 36-38).

---

laches, of which the plaintiffs were not guilty. The Court, however, expressly rejected these contentions, holding that as the Supreme Court of Missouri had repeatedly held that the Missouri statutes of limitation apply alike to legal and equitable actions, the federal court would follow the Missouri statute, and that the action against the defendant having accrued on June 1, 1932, and having expired by limitation on June 1, 1937, it was barred on June 15, 1938, when he was first served with process.

[38] In the case at bar the jurisdiction of the federal court rests both on the fact that the matter in controversy is between citizens of different states and the fact that the suit was one to enforce a right created by federal statute (R. 4).

We can think of no reason to assume that Congress by its silence intended to discriminate in favor of creditors of this type by freeing them from the limitation bar which controls the rights of other types of creditors. The reasoning of the Court in *Campbell* v. *City of Haverhill*, 155 U. S. 610, is persuasive. There the question was whether the statutes of limitations of the several states applied to actions at law for infringement of patents, a federally created right and solely enforceable in federal courts. At the time the cause of action arose, there was no limitation in the federal statute. The Court, in holding that the Massachusetts six-year statute of limitations applied, said as follows, page 616:

> "But why should the plaintiff in an action for the infringement of a patent be entitled to a privilege denied to plaintiffs in other actions of tort? If states cannot discriminate against such plaintiffs, why should Congress by its silence be assumed to have discriminated in their favor? Why, too, should the fact that Congress has created the right, limit the defenses to which the defendant would otherwise be entitled? Is it not more reasonable to presume that Congress, in authorizing an action for infringement, intended to subject such action to the general laws of the state applicable to actions of a similar nature? In creating a new right and providing a court for the enforcement of such right, must we not presume that Congress intended that the remedy should be enforced in the manner common to like actions within the same jurisdiction?
>
> "Unless this be the law, we have the anomaly of a distinct class of actions subject to no limitation whatever; a class of privileged plaintiffs who, in this particular, are outside the pale of the law, and subject to no limitation of time in which they may institute their actions."

The reasoning of the Circuit Court below is even more cogent, for it said:

> "It would be anomalous, indeed, to hold rights under these important federal laws (i.e., anti-trust, patent and national bank laws) strictly subject to state

limitations, and at the same time to permit the most extreme variation in the bar period for actions to enforce the statutory liability of a shareholder in a federal land bank. Such a divergence in treatment is opposed not only to common sense, but also to the clear implications of the *York* case. For that case quoted with approval the following statement from the dissenting opinion of Judge A. N. Hand, below: 'In my opinion it would be a mischievous practice to disregard state statutes of limitations whenever federal courts think that the result of adopting them may be inequitable. Such procedure would promote the choice of United States rather than of state courts in order to gain the advantage of different laws.' *York* v. *Guaranty Trust Co.*, 2 Cir., 143 F. 2d 503, 531". (R. 120)

(b) The rationale of the doctrine of uniformity.

There are, too, policy considerations underlying this whole problem, which strongly vindicate our position.

Our starting point must be, as it was in the *York* case, "the policy of federal jurisdiction which *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, embodies" (see *Guaranty Trust Company* v. *York*, *supra*, at page 1419).

It was the possibility for discrimination inherent in a system where courts of concurrent jurisdiction were able to reach directly opposite results on the same facts—sometimes even in litigation between the same parties[9]—that eventually necessitated the enunciation of the rule of uniformity of *Erie* v. *Tompkins*.

True, *Erie* v. *Tompkins* expressed only the rule to be followed where the federal court is sitting in diversity. However, where a federal court exercises concurrent jurisdiction with state courts, it would not seem to matter on which hook the jurisdiction of the federal court is hung: that is, diversity or existence of a federal question. The fact that the jurisdiction is exercised concurrently should

[9] See cases cited in *Erie R. Co.* v. *Tompkins*, *supra*, at 75, fn. 9.

be sufficient to bring into play the principle of uniformity expounded in *Erie* v. *Tompkins* and expanded in *Guaranty Trust Company* v. *York*. In regard to the application of this principle of uniformity the only material distinction between the case at bar and *Guaranty Trust Company* v. *York* is that the rights here involved were created by the federal government, whereas a state right was in issue in the *York* case.[10] The important question which this Court has now to decide is whether the fact that the source of the right is federal, rather than from a state, warrants the abandonment of the principle of uniformity expressed in *Erie R. Co.* v. *Tompkins*. We think not.

The need for a policy of uniformity goes beyond diversity cases. State and federal courts often exercise concurrent jurisdiction of rights created by federal statutes.[11] As a matter of fact, this very action could as well have been brought in a state court.[12] The mischief to be avoided in these cases is the same as existed in the diversity cases before *Erie* v. *Tompkins*—that is, the possibility of shopping for a favorable jurisdiction.

Of course, this is not to say that to achieve uniformity in the adjudication of federal questions, as to which the state and federal courts exercise concurrent jurisdiction,

---

[10] Petitioners rest heavily on the fact that this Court in the decision of the *York* case expressly ruled out of its considerations questions relevant to the disposition of a claim based on federal law. This Court, in rendering its decision in the *York* case, was not placing to one side *all* cases involving claims based on federal law, but only those cases where the federal statute in issue contained a period of limitation inconsistent with that of the state law, as the Circuit Court well recognized (R. 118).

The rule of the latter cases would, of course, be irrelevant in deciding a matter such as *Guaranty Trust Co.* v. *York;* but as the litigation at bar involves no conflicting federal statute of limitation, it is not of the type which this Court expressly put to one side in the decision of the *York* case.

[11] See, e.g., Federal Reserve Act § 123, 12 U. S. C. A. § 264(j), authorizing the Federal Deposit Insurance Corp. to sue or be sued in any court, state or federal. See, also, *Schram* v. *Keane*, 279 N. Y. 227.

[12] See note 17, *infra*.

dominance must be given to state law. While some problems require settlement in terms of local or state law, others just as surely call for a solution on a more national basis. In certain types of cases, the "attractive vision of a uniform body of federal law" [13] suggests the supremacy of federal law. In other types of cases, the equally attractive vision of conformity with the state courts in the enforcement of litigants' rights within any given geographical area, suggests the adoption of state law. In every case it is a matter of weighing and balancing these two competing and irreconcilable considerations. The Government urges that wherever a right is derived from a federal statute, it is more important that there be, so far as possible, nation-wide uniformity among the federal courts, rather than uniformity between state and federal courts in the same state (Br. pp. 4-5). We disagree. Of course, broad national questions, involving the rights of the Government and the interests of the entire country cannot be left to the vagaries of state law and consequently should be settled uniformly throughout the country. See, e.g., *Clearfield Trust Co.* v. *U. S.*, 318 U. S. 363. And in important questions of *private* rights involving the effectuation of federal legislative policy, state law should not be allowed to frustrate or nullify such federal policy. *D'Oench, Duhme & Co.* v. *F. D. I. C.*, 315 U. S. 447. But in other cases of private rights, where there is no such need for nation-wide uniformity, the predominant consideration is conformity in the enforcement of litigants' rights in any given area, for such conformity would eliminate the practice of "jockeying for jurisdiction", which has been described as the heart of *Erie* v. *Tompkins*.[14]

It must be obvious that not all issues arising in cases involving federal statutes present broad federal questions

[13] The phrase is Mr. Justice Frankfurter's in *Guaranty Trust Company* v. *York*, *supra*, p. 1420.

[14] Clark, J., Lecture on State Law in the Federal Courts, Vol. 114, No. 129, N. Y. L. J. 1575, at 1576, col. 7.

concerning the interests of the entire nation. For example, collateral issues in bankruptcy cases, regarding the interpretation of conditional sales, chattel mortgages and pledges are matters of local property law which even under the doctrine of *Swift* v. *Tyson*, 16 Pet. 1, were relegated to the state precedents.[15] And in such cases it has been recognized that principles controlling a plenary civil action in the state courts should apply in a summary bankruptcy proceeding.[16]

So also, the question of the proper period of time within which private rights accruing under a federal statute must be enforced, is a question of no great national interest. Both the Government (Br. p. 5) and the Trustees (Br. p. 34) admit that it would not impair the protection of federal rights to give effect to the varying state statutes of limitations in the ordinary case. And underlying all those cases cited above, at pages 8-11, wherein federal courts have applied state statutes of limitations in the enforcement of federal statutes, is the same admission. If the case at bar had originally been brought in a state court, as well it might have been,[17] the state court, respecting the recognized supremacy of the federal courts on federal questions,[18] undoubtedly would have felt itself bound by interpretations of the federal courts on the provisions of the statute, but would have applied its own appropriate state

---

[15] *Ibid.*

[16] See *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, where the Supreme Court directed the bankruptcy court to seek a state court adjudication. Cf. *Wickes Boiler Co.* v. *Godfrey-Keeler Co.*, 116 F. 2d 842 (C. C. A. 2), rev'd 121 F. 2d 415, cert. den. 314 U. S. 686. See also Clark Lecture, *loc. cit. supra*, note 14.

[17] See Circuit Court decision below, R. 120-121, citing *Friede* v. *Jennings*, 184 Atl. 369 (Conn.); and *Friede* v. *Sprout*, 2 N. E. (2d) 549 (Mass.). Had Congress meant to leave these questions to the exclusive jurisdiction of the federal courts, it would have so stated in the Act, as it did, for example, in the case of actions to recover the liability of stockholders of national banks in the case of voluntary liquidation. See, 12 U. S. C. Sec. 65.

[18] See, e.g., *Clearfield Trust Co.* v. *United States*, 318 U. S. 363

statute of limitations in determining the time within which the plaintiff had to commence his action.[19]

The Government has suggested that uniformity between the state and federal courts could in many instances be obtained by the adoption of a uniform federal law throughout the nation (Br. p. 5). This argument is not valid in connection with the problem of the appropriate period of limitations. If the federal courts were to apply their own rule of limitations, based, as it would be, only upon principles of laches, there would be no uniformity even among federal courts; for under the "notoriously amorphous"[20] and "uncertain"[21] laches rule, litigants' rights would be subject to innumerable variations in the federal courts, depending upon the operation of the particular instincts of the trial judge on any given state of facts. Far from creating uniformity, therefore, a federal rule of laches would only reinstate the chaos and confusion that the decisions of this Court in the *Erie* and *York* cases have set to rest.

If it be argued that the rule of the *Erie* and *York* cases was not meant to apply to cases of federally created rights, the answer as given by Justice Clark,[22] of the Second Circuit, is, we must fashion one of similar character for such cases.

(c) Absence of inequitable conduct.

Petitioners and the amici curiae concede that in the ordinary case a federal court, in equity as well as at law, will respect the principle of uniformity by applying state statutes of limitations in the adjudication of federally created rights (Pet. Br. p. 13; Tr. Br. p. 31, Govt. Br. p. 2).

---

[19] *Schram* v. *Keane*, 279 N. Y. 227, at 230.

[20] Rutledge, J., dissenting in *Guaranty Trust Co.* v. *York*, *supra*, at 142).

[21] Clark, J., dissenting in *Todd* v. *Russell*, 104 Fed. (2d) 169, at 176 (C. C. A. 2d).

[22] Lecture op. cit. *supra*, note 14, at 1576, col. 2.

But, they contend, where a defendant is guilty of such inequitable conduct as would tend to affect the commencement of the suit, a federal equity court has extraordinary powers to toll, if not entirely disregard, state statutes of limitations in dealing with federally created rights. The vice of such arguments here is that the fulcrum on which they turn is the assumption that Bache was guilty of some sort of inequitable conduct either in making the transfer to Armbrecht in the first place, or in continuing to carry the stock, after he acquired it, in the name of the nominee. This assumption is erroneous.

Bache was under no duty, equitable or otherwise, to have the stock registered in his own name (see *Broderick* v. *Aaron*, 264 N. Y. 368, 377).

The courts frequently have recognized the widespread practice for owners of stock to have that stock registered in the name of nominees.[23] It is well known that banks, both state and national, carry stock in the names of nominees—often partnerships created among certain of their officers—for the purpose of facilitating the transfer of such stock, *inter alia*. As the district court commented, "there must be any number of reasons that a man can give readily for carrying stock in a name other than his own" (R. 68). In the case at bar, of course, there was a compelling reason for holding the stock in the name of a nominee, for here, in accordance with custom, the stock was pledged with the brokerage firm as security for Bache's personal margin account.

For a transfer to be inequitable it must be made with the sole or primary purpose of avoiding the statutory liability, as petitioners' own cases show. (See cases cited pp. 20-21, Pet. Br.) The implication of the district court, creating the impression that there was something unethical about Bache's conduct, was based on a patently erroneous finding, that the stock was placed by Bache in Armbrecht's

[23] Counsel for petitioners acknowledged the legitimacy of the practice by saying: "Now if I am to put stock, for example, in the name of my wife, with her full knowledge, I might not be guilty" (R. 68).

name in 1931 shortly before the bank's insolvency; whereas, the undisputed documentary proof in the record shows that it was placed in Armbrecht's name by J. S. Bache & Co. in January, 1928, years before there could be reason to suspect or anticipate the imminent possibility of double liability.

Petitioners contend that respondents were "found" guilty of inequitable conduct by the district court. They are wholly in error as to this as there was no such finding. Further, there is nothing in the record that would support such a finding or support even an inference that Bache's purpose in retaining the stock in Armbrecht's name as nominee was to avoid liability. Quite the contrary appears in the record. The district court recognized that this was a perfectly legitimate practice, which could in no way be construed, *prima facie*, as designed to avoid liability, because it obviously would not have this effect (R. 68). The mere transfer of shares, and the maintenance of silence with regard thereto, is in no respect improper or illegal (see *Ball* v. *Gibbs*, 118 F. [2d] 958, 961, 962 [C. C. A. 8]).

(d) The arguments of petitioners and the amici curiae have failed to meet the issue.

Since Bache was not guilty of inequitable conduct, our opponents' arguments cannot avail on the facts of record before this Court, even if such arguments were supportable as a matter of law. Moreover, their arguments are not supportable as a matter of law, as we shall now show.

To what do they attribute the asserted power of a federal equity court to disregard state statutes of limitations in dealing with federal questions? Some of their arguments seem to attribute it to the equitable nature of the right in issue, while others of their arguments attribute it to the federal source of the right.

Thus, one argument of petitioners is that in cases of equitable cognizance federal courts need not apply state

statutes of limitations, because in such cases they are not controlled by the Rules of Decision Act (Pet. Br., p. 11). We find the answer to this argument in a single quotation from *Guaranty Trust Co.* v. *York*, 89 L. Ed. 1418, at 1420-1421, where this Court said that the Rules of Decision Act

> "was deemed, consistently for over 100 years, to be merely declaratory of what would in any event have governed the federal courts and therefore was equally applicable to equity suits."

Another argument of petitioners, that the equitable rule of laches is determinative in this case, thereby enabling an equity court to toll the period during which defendants remain in hiding (Pet. Br., pp. 18-19), is based on the erroneous premise that laches, not statutes of limitations, is the sole barometer in all equity actions (id., p. 12). This premise stands in the very teeth of the ruling in *Russell* v. *Todd*, 309 U. S. 280, 287, 293, that federal equity courts apply state statutes of limitations applicable to equity actions.

The Trustees, on the other hand, do not make the mistake of arguing that equity is bound only by laches, not by statutes of limitations, in the ordinary case; but they contend that by virtue of the historic power of an equity court to relieve against fraud and inequitable conduct, the federal court will not be bound by state rules of limitations where the defendant is guilty of fraud (Tr. Br., pp. 25-32); and thus, say the Trustees, in such cases federal courts are free to apply a rule of laches (id., p. 29).

The Government has made an argument very similar to that of the Trustees (set forth above), to the effect that the power of a federal court in cases of fraud and inequitable conduct, to qualify a statute of limitations to the extent of tolling it until the discovery of the fraud, enables a federal court in an appropriate case to disregard a state rule regarding the period of limitations (Govt. Br. pp. 6-8).

The emphasis in all these arguments is on the power which a federal court derives from the equitable nature of the case before it. Assuming that these suits to recover the statutory liability are fundamentally equitable, we cannot agree with the Government and the Trustees that the power of a federal equity court to relieve against fraud gives the federal court power to ignore or qualify an otherwise controlling state statute of limitations, even if we were to concede that Bache was guilty of inequitable conduct. The power to relieve against fraud is embodied in the leading case of *Bailey* v. *Glover*, 21 Wall. 342, and its successor, *Exploration Co.* v. *United States*, 247 U. S. 435. The simple rule of law of these cases is that, in matters where the object of the suit is to obtain relief against fraud, federal "statutes of limitations upon suits to set aside fraudulent transactions shall not begin to run until the discovery of the fraud" (*Exploration* case, at 449). It is this rule (and not, incidentally, any doctrine of laches, as claimed by the Trustees at p. 29 of their brief) that was relied on in the now repudiated diversity case of *Kirby* v. *Lake Shore & Michigan Southern Railway*, 120 U. S. 130, to support the power of a federal court in a case based on fraud to toll the running of a state statute of limitations until the discovery of the fraud.

It must be pointed out that this power to toll the statute of limitations exists only where "the object of this suit is to obtain relief against fraud"[24]—that is, "where relief is asked for on the ground of actual fraud".[25] It is patent that fraud is not the foundation of a suit to recover the statutory liability imposed upon stockholders by Title 12, § 812, of the United States Code (see *Downey* v. *Palmer*, 32 F. Supp. 344, 345-346 [S. D., N. Y.], rev'd on other

[24] *Bailey* v. *Glover*, *supra*, at 347.

[25] *Kirby* v. *Lake Shore & Michigan Southern Railway*, *supra*, at 136.

grounds 114 F. [2d] 116 [C. C. A. 2]).[26] Thus the rule of *Bailey* v. *Glover* has no bearing on the case at bar.

Even if we agree that this rule is broader than the cases seem to indicate and the theory of the fraud cases is available to our opponents, this does not establish the contention of the Government and the Trustees that because a federal court has the power to qualify or reject *federal* statutes of limitations where they are applicable, by the same token it has the power to qualify or reject *state* statutes of limitations where they are applicable. Different problems from those raised in the *Bailey* case are presented when a state, rather than a federal statute of limitations is before a federal court. We may concede that the *Bailey* case expresses the federal rule on the question of the proper application of federal statutes of limitations. It is also expressive of the "now almost universal"[27] rule in this country in both state and federal courts; *e.g.*, see New York Civil Practice Act, § 48, subdiv. (5); *Clarke* v. *Gilmore*, 149 App. Div. 445, 450; *Dodds* v. *McColgan*, 229 App. Div. 273. But the *Bailey* case only announces the sub-

[26] The instant action cannot be classified as one to recover a judgment on the ground of fraud (Civil Practice Act, § 48 (5)), because the respondents' liability is based upon their ownership of the stock, record or beneficial, not on fraud (*Forrest* v. *Jack*, 294 U. S. 158; *Ohio Valley National Bank* v. *Hulitt*, 204 U. S. 162; *Pauly* v. *State Loan & Trust Co.*, 165 U. S. 606; *Durrance* v. *Collier*, 81 F. (2d) 4, 7; *Broderick* v. *Aaron*, 264 N. Y. 368, 373). The cause of action accrues apart from any element of fraud (*Glover* v. *National Bank of Commerce*, 156 A. D. 247; *Carr* v. *Thompson*, 87 N. Y. 360; *Brick* v. *Colin-Hall-Marx Co.*, 276 N. Y. 259, 264; *Druckerman* v. *Harbord, et al.*, 31 N. Y. S. 2d 867, 870, and *Adolf Gobel, Inc.* v. *Hammerslough*, 263 A. D. 1, 2, aff'd 288 N. Y. 653). Furthermore, if fraud would have been alleged and proved, it would have been constructive fraud, not actual fraud, and the statute, therefore, would have begun to run at the time when the fraud was perpetrated, not when actually discovered (*Hearn 45 St. Corp.* v. *Jano*, 283 N. Y. 139; *Nasaba Corp.* v. *Harfred Realty Corp.*, 287 N. Y. 290; *Battles* v. *Smith*, 281 N. Y. 226). Finally, the complaint does not contain sufficient allegations to sustain an action for fraud and deceit (*Curacao Trading Co., Inc.* v. *W'm. Stake Co.*, 2 Fed. Rules Dec. 308 and cases cited), and fraud was not proved at the trial.

[27] *Exploration Co.* v. *United States*, *supra*, at 449.

stantive law of the forum, stating the rule to be applied where the federal court is free to apply its own rule without regard to state laws, because there is no applicable state statute of limitations. The *Bailey* case did not decide that a federal court is free to apply its own rule of limitation *in disregard* of an otherwise applicable state statute of limitations. That the court in the *Kirby* case thought it did is irrelevant. Upon later reflection, the *Kirby* holding in this regard was rejected (see *Guaranty Trust Co.* v. *York*, *supra*, at 1425).

Since the decision in the *Kirby* case it has been decided that a federal court cannot apply the federal rule of the *Bailey* case, in disregard or qualification of an applicable state statute of limitation, where the matter in issue involves a state created right (*Guaranty Trust Co.* v. *York*). It remains to be decided by the case at bar whether the federal rule may be applied in disregard of an applicable state statute of limitation where the matter involves a federally created right.

It only begs the question to argue, as have the Trustees (Br., pp. 30-31) and the Government (Br., p. 8) that because the federal rule was applied, as such, in cases where a federal statute of limitation is involved, it must follow, *a fortiori*, that the federal rule will be applied, as such, whenever the federal court is expounding a federal jurisprudence, even where an appropriate state statute of limitation would ordinarily be controlling due to the absence of a federal one. This no more follows than it does to argue that, because New York has in its Civil Practice Act, § 48(5), a rule similar to that of the *Bailey* case, which it applies to actions based on New York rights, it will apply the same rule to actions based on New Jersey rights, *a fortiori*. It is not an *a fortiori* situation. An entirely different type of problem is presented when one jurisdiction is dealing with the question of the conclusiveness of the laws of another jurisdiction. Of course, we do not claim that the question of the conclusiveness of a state statute of limitations in a federal court in the case of a

federally created right is analogous to the question in the usual conflicts case. We realize that the respect which New York might give to New Jersey law in adjudicating a New Jersey right is based on such principles as comity and "full faith and credit"; whereas, the respect which a federal court might give to New York law in adjudicating a federal right would be based on principles of uniformity, such as were expounded in *Erie R. Co.* v. *Tompkins*. But the type of problem in both cases is the same, for in both, the problem of the conclusiveness of the laws of a jurisdiction other than the forum is present.

If this Court in the instant case decrees that, because of the existence of concurrent jurisdiction with the state courts, a uniformity of decision should prevail between state and federal courts in any given territorial area, the federal courts are no longer free to apply their own rule of *Bailey* v. *Glover* in cases of concurrent jurisdiction, unless it is also decreed that, under the analysis suggested *supra*, page 15, this is the type of problem in which uniformity should be attained by adherence to federal rather than state law.

The rule argued for by the petitioners (Br., pp. 18-19) to the effect that laches does not run in favor of a defendant in hiding, is similar in type to the rule of *Bailey* v. *Glover*. It, too, is, at most, a substantive rule of law that might be applied by the federal courts where they are free to apply their own rule, and the question whether they are free to apply such a rule is for this Court now to decide as a matter of fresh impression.

We submit, therefore, that those arguments that base the asserted right of a federal court to ignore state statutes of limitations on some equitable power are not persuasive, as they do not meet the issue before this Court.

It remains for us to consider the validity of those arguments contending that the fact that the source of the right is federal gives a federal court greater latitude in applying or disregarding state statutes of limitations.

Petitioners argue that state laws are inapplicable to rights created under federal statutes (Br., p. 13). As a general proposition, this statement is, of course, unsupportable. We have already seen that federal courts are bound by state statutes of limitations in proceedings to enforce rights created by the anti-trust laws, patent laws and the National Bank Act; and we have also seen that federal bankruptcy courts adopt local rules with regard to such collateral issues in bankruptcy as the interpretation of conditional sales, mortgages and pledges. In view of the cases cited by the petitioners to support the above statement, namely, the *Deitrick* and *D'Oench* cases, it is obvious that they do not have in mind any such broad proposition. Rather, they apparently have in mind the same proposition that is contended for by the Trustees and the Government to the effect that a federal court has power to ignore state statutes of limitations in certain cases, which power can be "predicated on" (Br., p. 32) or "articulated * * * in terms of" (Govt. Br., p. 13) the rule that in exclusively federal matters—that is, where the rights are created by federal statute or the constitution—a federal court will qualify or completely disregard an otherwise applicable state rule, where to give effect thereto would nullify or frustrate the federal policy expressed in the statute. This principle of subjugating state law to effectuate federal policy seems first to have been clearly expressed in the case of *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp.*, 315 U. S. 447, although the slightly earlier and very similar case of *Deitrick v. Greaney*, 309 U. S. 190, was a harbinger of the doctrine.[28]

[28] The Government, incidentally, seems to have attempted to ascribe to the *Bailey* case the attributes of the *D'Oench* case, claiming that underlying the *Bailey* case was the doctrine of preventing the frustration of federal policy. A reading of the *Bailey* case quickly dispels this contention. As we have already noted, the *Bailey* and *Exploration* cases did not consider the special problem of the power of a federal court to override applicable state law in dealing with federally created rights.

We find considerable merit in the doctrine of the *D'Oench* case. We agree that in the adjudication of federal rights, federal courts need not blindly follow state rules, the application of which would nullify or frustrate the clear purpose and policy of the federal legislation involved. In our argument above (at p. 15) we readily agreed that the doctrine of uniformity does not require federal courts to yield to state courts in matters where the effectuation of federal policy hangs in the balance. In the ordinary instance, however, it is agreed by the Trustees (Br., p. 34) and the Government (Br., p. 5) that state limitations statutes governing private rights do not conflict with or frustrate federal policy, even though they may vary from state to state. The policy behind statutes of limitations is more venerated than any policy embodied in any single federal statute and, in fact, runs through all federal statutes. To require the commencement of an action on a right created by federal statute within a reasonable time is plainly consistent with the policy of such statute.

(c) The state statute controls if only by analogy.

We believe that we have successfully shown that federal courts, at least in the adjudication of *private* rights created by federal statute, are bound to follow state statutes of limitations applied to similar matters in the state courts. However, even if this Court rules that state statutes of limitations are never strictly binding on federal courts in the adjudication of federally created rights, the ten-year period of the New York statute of limitations would be controlling here. For it is conceded that even courts which are not strictly bound by state statutes of limitations will apply the periods of related statutes of limitations, if only by analogy. In applying state periods, courts never *lengthen* these periods; they take them as they are, only reserving the power to toll them against a defendant guilty of fraudulent conduct the nature of which is unknown to the plaintiff. See *Bailey* v. *Glover*, *supra*, and *Explora-*

tion Co. v. *United States, supra.* When the tolling ceases (as on the discovery of the fraud) a period of limitations is applied exactly as specified in the relevant state statute of limitations (see *Kirby* v. *Lake Shore & Michigan Southern Railway*, 120 U. S. 130, 139), except that in extraordinary cases a court will *shorten* this state period by virtue of the doctrine of laches. We believe that the record here shows petitioners were guilty of laches, as we hereafter point out in our Point II. However, under the foregoing analysis it is unnecessary for us to establish that petitioners were guilty of laches for the reason that the ten-year period of limitation which must be applied in any event, if only by way of analogy, has expired.

It is odd to note that the petitioners have cried "laches" in this case. Laches is a defendant's weapon. It is the doctrine whereby a court in a case of equitable cognizance can modify an otherwise controlling statute of limitations to the extent of *shortening* it in a case where the plaintiff has been guilty of an unreasonable delay in the prosecution of his claim, to the prejudice of the defendant (*Groesbeck* v. *Morgan*, 206 N. Y. 385; *Hall* v. *Ballard*, 90 F. [2d] 939, 946; 2 Carmody, New York Practice [1930], Secs. 409, 411). Laches never has the effect of lengthening a statute of limitations (*Ball* v. *Gibbs, supra*, at 960-961).

POINT II

Assuming that the doctrine of laches is pertinent, the district court should have found that the petitioners were guilty of laches.

Only if this Court shall decide that the state statute of limitations is neither binding nor controlling by analogy does the question of whether the petitioners were guilty of laches become important. The Circuit Court, in view of its decision, found it unnecessary to decide this question. If this Court, however, reaches a result which makes

it necessary to consider the question of laches, we assume that it will remand the case to the Circuit Court for the consideration of this question.

Owens v. *Union Pacific R. Co.*, 319 U. S. 715;
Grant v. *A. B. Leach & Co., Inc.*, 280 U. S. 351;
Pusey & Jones Co. v. *Hanssen*, 261 U. S. 491, *rev'g* 279 Fed. 488;
Liberty Oil Co. v. *Condon National Bank*, 260 U. S. 235.

In the event that this Court may itself determine to consider the question, we shall now discuss it. At the outset we point out that whatever may be said by the petitioners, by way of excuse, that it took them more than ten years to find out that Jules S. Bache was the beneficial owner of the stock, can under no circumstances avail them in respect of their failure to proceed for that period against Armbrecht. As a matter of fact, had they proceeded against Armbrecht with any degree of diligence they would have promptly discovered, as they did when they finally brought their action, that Jules S. Bache was the beneficial owner of the stock. Even when they did discover it in 1942, they waited over thirteen months to start action against him.

Any difficulties which the petitioners and their attorneys suffered in the early stages of the litigation against the bank stockholders were completely resolved on December 24, 1936, by the decision on appeal in *Holmberg* v. *Carr*, 86 Fed. (2d) 727 (R. 37). With the legal difficulties solved, all that was required was the normal procedure of serving Armbrecht. This had been accomplished in a prior action without apparent difficulty in August, 1936 (R. 101, Finding of Fact 4) and the record shows no valid reason for the failure to serve him again until November, 1943. Despite the long period of inactivity between August, 1937 and January, 1942, and the additional period of thirteen months after September, 1942 during which petitioners and their

attorneys did nothing to pursue Jules S. Bache, the district court refused to sustain respondents' claim that expedition was lacking, and held, contrary to the evidence, that petitioners were not prejudiced even if there were delay.

The elements of laches—delay in bringing the action and the resulting prejudice to the respondents—are both present. We believe it unnecessary to further argue the point that, on the record here, waiting more than eleven years to commence suit, constituted delay. Not only was the delay unwarranted, but petitioners' conduct evidences a sheer lack of diligence. Whatever credit they may assert in respect of the diligent prosecution of their claims against other stockholders, cannot on any theory avail them here. Their argument below to the effect that they were unable to serve Armbrecht was based on their counsel's statements that he could not be located as reported by this one or that one who said they did not know where he lived, but they never at any time went to the people who would know his address, that is, his son, whose address and telephone number counsel had and gave to the process server, and J. S. Bache & Co., in whose care he was listed on the very books of the Bank. True, counsel for petitioners testified he personally had made an effort to locate Armbrecht, visiting in the summer of 1937 the address at which he had been served in 1936 (R. 51). But counsel did nothing further so far as Armbrecht was concerned until after an accidental meeting with western counsel in December, 1941 or January, 1942 (R. 52-53). Subsequently, in the realization that the ten-year statute of limitations was about to bar the petitioners, he commenced suit in May, 1942 against Armbrecht and included the firm of J. S. Bache & Co. as a defendant. No explanation for this long delay was given or offered at the trial and no attempt was made in any respect to excuse it.

Petitioners' claim, made at the trial, that it necessarily took them more than ten years to find out that Jules S. Bache was the beneficial owner of the stock is con-

pletely without merit. It appeared on the Bank's own records that the stock had been placed in Armbrecht's name by J. S. Bache & Co. in 1928, that Armbrecht's address as set forth on the stubs of the certificates was care of "J. S. Bache & Co., 42 Broadway, New York", and that on each of the three cancelled certificates in the name of J. S. Bache & Co., making up the one hundred shares in suit, there was stamped a notation that J. S. Bache & Co. disclaimed any interest in the stock and had acted only as broker for account of a customer. This certainly put anyone who was interested on notice that J. S. Bache & Co. knew the name of the customer for whom it had acted. The original stock records of the Bank were at all times available to petitioners' trial counsel. He actually had them in his possession in May and June, 1938 and he admits that he looked through them while trying the *Holmberg* v. *Anchell* case before Judge Woolsey (R. 59). Action against Armbrecht and J. S. Bache & Co. might then have been started; and, irrespective of service upon Armbrecht, one or more of the numerous members of the firm of J. S. Bache & Co. could readily have been served. Therefore the name of Jules S. Bache as the beneficial owner of the stock, so readily testified to by Stern when he was examined before trial in September, 1942, could just as easily have been obtained at least in 1938.

If it be argued that counsel's activities on behalf of petitioners against other respondents kept him too busy during the period between 1936 and the entry of judgment in February, 1939 in the *Anchell* case to bother about Armbrecht and his stock, for that seems to be the plaint of the decision of the district court, there is certainly no such basis for his failure to proceed promptly against Jules S. Bache when he learned in September, 1942 that he was the beneficial owner of the stock. For more than thirteen months thereafter counsel did nothing so far as Jules S. Bache was concerned. It is apparent that he felt that the ten-year statute of limitations had run against Bache.

This delay was prejudicial to the respondents. The complaint herein did not contain sufficient allegations for an action for fraud and deceit; and it therefore was apparent under the decisions that based on this theory the petitioners could not succeed.[29] Bache, in his answer, frankly admitted beneficial ownership of the stock. Carrying the stock in the name of a nominee was the usual practice and the law is well settled that such practice *prima facie* is in no respect fraudulent.[30] Bache, therefore, had every reason to believe and to rely on the fact that there was nothing for him to do except await the trial. The burden of proving fraud was upon the petitioners; and Bache knew, and the record of the trial justifies his belief, that petitioners could not succeed in establishing any fraud.

No amended complaint was ever served. At the trial, seven months after Bache's death, the petitioners made no attempt to prove that Bache had been guilty of fraud. Instead they asserted that Bache, aided by Armbrecht's failure to meet his liability by some obligatory affirmative act, the nature of which was not stated, had been guilty of inequitable conduct by permitting the stock to be held in his margin account in the name of Armbrecht. No evidence, however, was offered of any wrongdoing or improper conduct on the part of Bache.

It is a well-established principle that the rule of laches is especially to be enforced where the right to relief is based on the alleged fraud of a person who had died (*Naylor* v. *Foreman Blades Lumber Co.*, 230 Fed. 658; *Hammond* v. *Hopkins*, 143 U. S. 224). The rule generally applies in cases where the person charged with fraud or inequitable conduct died before the institution of the suit. But we cannot find any reason why the same rule should not apply in the present case in which, although the suit was instituted before Bache's death, the contention that

[29] See footnote 26, *supra*.

[30] See page 18, *supra*.

Bache was guilty of inequitable conduct was for the first time advanced after he was dead. His death, coming as it did so soon after the action was commenced, prevented the respondents from meeting the claim that his conduct was inequitable, in that they were unable to adduce any proof to meet a claim never advanced while he was alive.

Petitioners' long lapse of time in bringing the action prejudiced the respondents in still another way, for in 1937 or 1938 J. S. Bache & Co. had destroyed all its records of transactions prior to October, 1931 (R. 74). Respondents were thus prevented from establishing when and under what circumstances Jules S. Bache acquired the stock, and his reason for holding it in the name of a nominee. The importance that the district court placed upon the time when Jules S. Bache acquired the stock is shown by the significance the court attached to the erroneous findings that Bache had acquired it in October, 1931 and then caused it to be placed in Armbrecht's name.

Respondents were thus prejudiced by the long delay and the district court erred in not finding petitioners guilty of laches. As was said by this Court in *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342, at 348-9:

> "*Statutes of limitation, like the equitable doctrine of laches*, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend *within the period of limitation* and that the *right to be free of stale claims* in time comes to prevail over the right to prosecute them." (Italics supplied.)

POINT III

The question as to the date of accrual of the cause of action cannot properly be considered by this Court.

The Trustees and also the petitioners (the latter with obviously less conviction) have attempted to place before this Court the question of when the cause of action herein accrued, on the theory that if this Court should decide that the state statute of limitations is binding on federal courts, the petitioners might be deemed to have brought their action within the time specified in the applicable state statute of limitations. The question of when the cause of action accrued against the stockholders of the Southern Minnesota Joint Stock Land Bank is a brand new question so far as this suit is concerned. Sufficient facts were not introduced at the trial with which to decide the question. The question was not raised in the briefs, nor argued orally before either of the lower courts; and, therefore, it was never considered or passed upon by the lower courts. Furthermore, it was not raised in the petition for certiorari addressed to this Court. It has always been assumed by all the parties and the lower courts that the cause of action accrued on May 2, 1932, the date the Bank closed its doors and was declared insolvent by the Federal Farm Loan Board, who thereupon appointed a statutory liquidating receiver pursuant to Title 12, § 963 of the United States Code. (See *Holmberg* v. *Southern Minnesota Joint Stock Land Bank*, 10 Fed. Supp. 795, 796, 801; *Holmberg* v. *Anchell*, 24 Fed. Supp. 594, 600). Suddenly in the brief filed by the Trustees as amici curiae in this Court, the question was raised for the first time.

As a matter of law, it is obvious that this question can not be considered by this Court. In the first place, it was neither raised as a question nor assigned as error in the petition for a writ of certiorari.

See:

Rorick v. *Devon Syndicate Ltd.*, 307 U. S. 299;
Crown Cork & Seal Co. v. *Ferdinand Gutmann Co.*, 304 U. S. 159;
General Talking Pictures Corp. v. *Western Electric Co.*, 304 U. S. 175;
Olson v. *United States*, 292 U. S. 246;
Gunning v. *Cooley*, 281 U. S. 90.

See, also:

Johnson v. *Manhattan Railway Co.*, 289 U. S. 479;
Blair v. *Oesterlein Mach. Co.*, 275 U. S. 220; and
Webster Elec. Co. v. *Splitdorf Elec. Co.*, 264 U. S. 463.

Furthermore, questions which were not presented to the Circuit Court or determined by it are not open for consideration in the Supreme Court.

Sonzinsky v. *United States*, 300 U. S. 506;
Minnich v. *Gardner*, 292 U. S. 48;
Lynch v. *United States*, 292 U. S. 571;
Burnet v. *Commonwealth Improvement Co.*, 287 U. S. 415;
Husty v. *United States*, 282 U. S. 694;
Blair v. *Oesterlein Co.*, 275 U. S. 220, 225;
Pine River Logging & Improvement Co. v. *United States*, 186 U. S. 279.

As stated in *J. M. Robinson & Co.* v. *Belt*, 187 U. S. 41, the action of the lower courts —

> "should not be reversed upon questions which the astuteness of counsel in this court has evolved from the record. It is not the province of this court to retry these cases *de novo*."

Even if this were not the law, this Court could not consider the question, because, to determine when the action

accrued, certain ultimate facts, such as whether the liquidation was voluntary or otherwise, or whether a statutory receiver was appointed and whether he ever made an assessment, are necessary to be known. These facts are not in the record, because they were not deemed important at the trial, since the question of when the cause of action accrued was not in issue. The review of Circuit Court decisions is confined to matters properly presented in the record (see 12 *Cyc. Fed. Pro.*, 2d ed., p. 347). The Supreme Court will not consider questions of law when there is no assurance that the record contains all the evidence material to their decision (*Halbert* v. *United States*, 283 U. S. 753).

Further, this question cannot properly be raised in this Court, because it has already been decided against the petitioners in prior suits, and such previous determinations are *res judicata*. The Farm Loan Board had declared the Bank insolvent and in default on May 2, 1932, and appointed a statutory receiver on that day, as already observed. In the action commenced by the petitioners against the Bank and its stockholders in the Minnesota District Court in 1932 to have the Bank declared insolvent and to fix an assessment, it was held as a matter of law:

> "that each stockholder of the defendant * * * *was on May 2, 1932, and at all times since*, and is at the present time liable to the creditors of the defendant * * * in the amount of the par value of the shares of stock so held by him" (*Holmberg* v. *Southern Minnesota Joint Stock Land Bank*, 16 Fed. Supp. 795, 798). (Emphasis ours.)

In 1937 a creditors' bill was brought in New York by the same petitioners to enforce the statutory liability against such New York stockholders as had not previously satisfied the liability against them. In this action, in which Armbrecht was named but for some unaccountable reason never served, the Court held:

> "The cause of action accrued and the plaintiffs must be deemed to have been aware of their right to sue

stockholders at least by July 28, 1932, when they began their suit in Minnesota" (*Holmberg* v. *Anchell*, 24 Fed. Supp. 594, 691, aff'd 110 F. [2d] 1022 [C. C. A. 2]).

The holdings in both of the above cases were directed to contentions of the parties concerning laches and statutes of limitations, and so the holdings were material to those judgments.

It was said, in *Krauthoff* v. *Kansas City Joint Stock Land Bank*, 31 F. (2d) 75, 76, 77, that where in a prior action there is an identity of subject-matter and issues with the case at bar and the same plaintiffs are bringing the action against "substantially the same defendants", the decision in the prior case is *res judicata* as to the plaintiffs, apparently even though it would not be binding, under the rule of *Christopher* v. *Brusselback*, 302 U. S. 500, as to defendant-stockholders who were not parties to the prior action. It is established that a defendant, though not bound by an *adverse* holding in a prior case concerning the same subject-matter, can set up as a defense previous material determinations reached in the prior action in which the present plaintiffs were parties and had brought the action against parties standing in the same legal position as the present defendants (see *Good Health Dairy Products Corp.* v. *Emery*, 275 N. Y. 14; *cf. Elder* v. *New York & Penn. Motor Express Co.*, 284 N. Y. 350). The reason for this rule, of course, is that the present plaintiffs had a full opportunity to litigate the issue in the prior case.

Thus any one of several theories supports the conclusion that the question raised by the Trustees, as to when the cause of action accrues against the stockholders of a land bank, cannot be considered by this Court in the present case.

Moreover, could this Court consider the question, it would probably decide that the cause of action in cases of this nature accrues at or about the time when the bank is declared insolvent by the Farm Credit Administration. The action of this Court in *Russell* v. *Todd*, 309 U. S. 280,

aff'g 20 Fed. Supp. 930 (S. D. N. Y.), is indicative. In that case the district court had held that the cause of action of creditors of an insolvent joint stock land bank, to enforce the statutory liability of stockholders, accrued on the date when the administration by the receiver of the bank had proceeded far enough to enable him to know that the bank could not pay its debts in full (20 Fed. Supp. at 934). That date in the *Todd* case was April, 1928. The fact that the receiver appointed by the Farm Loan Board was not authorized to assess the stockholders was said to be irrelevant. The Supreme Court did not in any way question these rulings, but said:

> "The district court found, as is conceded here, that the cause of action accrued April 6, 1928, * * * and that the suit was commenced * * * on December 16, 1931 * * * (309 U. S. 284). The present suit was brought in less than four years after the cause of action had accrued * * *" (id., at p. 290).

Obviously the Supreme Court accepted the district court's ruling as to the time of the accrual of the cause of action as correct.

Furthermore, in every other case that we have found dealing with the question of when the cause of action accrues against the stockholders of a land bank, it has been held that the cause of action accrues either on the date the bank is declared insolvent and is placed in receivership, or at the very latest when it is manifest to the creditors that the bank is insolvent and they begin suit against the bank.

Ball v. *Gibbs*, 118 F. (2d) 958, 960 (C. C. A. 8);
Holmberg v. *Southern Minnesota Joint Stock Land Bank*, 10 Fed. Supp. 795, 798;
Holmberg v. *Anchell*, 24 Fed. Supp. 594, 601, aff'd 110 F. (2d) 1022;
Brusselback v. *Cago Corporation*, 24 Fed. Supp. 524, 532 (S. D. N. Y.);
In re Christopher's Estate, 35 N. E. (2d) 454, 459 (Ohio).

The petitioners and the Trustees have cited no cases to the contrary, and we do not believe any exist. In support of their argument that the cause of action should be deemed to accrue at the date of the levying of an assessment, which in the case of a land bank would not occur until a judicial assessment is made, the Trustees have cited only national bank cases. But the rule of these cases is not applicable to joint stock land bank cases. In fact, as we shall now show, the rule contended for by petitioners and the Trustees would result in there being no statute of limitations applicable to this type of action.

Superficially the cases involving the enforcement of the liability of stockholders of a national bank in voluntary liquidation present an attractive analogy to our situation, because the procedure prescribed in Section 65, Title 12, of the United States Code for enforcement of the liability of stockholders of a national bank in voluntary liquidation is somewhat similar to that initiated by *Wheeler* v. *Greene*, 280 U. S. 49, for the enforcement of the liability of stockholders of a joint stock land bank.[31]

However, there is at least one very important difference between the two procedures: Section 65 requires that the suit to determine and enforce the assessment of stockholders of a national bank must be brought only in "the district in which such association may have been located or established", and the assessment determined in such district court is binding even on non-resident stockholders not served in said suit (see *Hall* v. *Ballard*, 90 F. (2d) 939, 946-947—C. C. A. 4). On the other hand, in the case of stockholders of a land bank, *Wheeler* v. *Greene*, as amplified by *Christopher* v. *Brusselback*, 302 U. S. 500, allows the suit against stockholders of a land bank to be brought in any and all "neighborhood" courts where stockholders can

[31] Incidentally, this similarity of procedure is not due, as the Trustees would have it (Br., pp. 15, 16), to any identity of statute, but rather to the fact that *Wheeler* v. *Greene*, without referring to or relying on the procedure blocked out in Section 65, suggested a somewhat similar procedure on principles of general equity

be found, and the assessment levied in the original creditors' suit to have the bank declared insolvent and a receiver appointed by the federal court of the district where the bank is located is without extraterritorial effect and not binding on any stockholders not a party to such suit (see, also, *Holmberg* v. *Carr*, 86 F. (2d) 727—C. C. A. 2). Therefore, while only one assessment is made against all the stockholders and the date of its payment fixed in the case of the voluntary liquidation of a national bank, so that the cause of action against all the stockholders accrues on one certain day, theoretically the cause of action against each stockholder of a joint stock land bank could accrue on a different day as a separate assessment might be required as to every stockholder. As a matter of fact, since the determination of the amount of the assessment is prerequisite to the enforcement of the assessment against any stockholder (see *Christopher* v. *Brusselback, supra*, at 502-503), and since the prerequisite assessment must be made "in the very case in which the stockholders were being sued personally, not * * * in an earlier case against the bank" (*Partridge* v. *Ainley*, 24 Fed. Supp. 43, 44—S. D. N. Y.), it follows that there would be no enforceable liability against a stockholder until the very suit in which he is sued is commenced. There being no enforceable liability, there would be no cause of action; and if there is no cause of action, the appropriate statute of limitations could not begin to run. Thus, under the rule argued for by the Trustees, *the statute of limitations on a suit to enforce the assessment against a stockholder would not begin to run until the suit itself is commenced!* The statement bears the seed of its own destruction.

The Trustees contend, at page 22 of their brief, that the fact that the assessment in the original liquidation proceeding against the bank is not binding on stockholders not served in such suit, does not alter the general rule that the cause of action to recover the assessment, even against stockholders not served, accrues on the date of the determination of the assessment in the original liqui-

dation proceeding. This contention is untenable. It is obviously illogical to claim that the cause of action for the assessment accrued against Armbrecht and Bache when the amount of the assessment was determined in the original liquidation suit in Minnesota; such assessment had absolutely no bearing or effect on their liability. That is, Armbrecht and Bache were not liable for the amount of the assessment determined in the Minnesota suit. How then can it be argued that their liability for assessment accrued on the date of the Minnesota assessment?

Even the case of *Hall* v. *Ballard*, *supra*, at 945, relied on so heavily by the Trustees to support the proposition that the cause of action to enforce the liability for the assessment accrues on the date that a judicial determination of the assessment is made, recognizes that the cause of action to determine the amount of the assessment accrues upon the insolvency of the bank, or at least when the insolvency becomes manifest (as by the return of execution unsatisfied against the bank in the *Hall* case). In other words, the *Hall* case suggests that there are two causes of action: one to determine the amount of the assessment, and the other to enforce the assessment as determined.[32] Under this analysis the petitioners would still be vulnerable to the defense of the statute of limitations, for the suit to determine the amount of the assessment against Armbrecht and Bache was not commenced until 1943, although the insolvency had become manifest eleven years before, in 1932, when the Farm Loan Board declared it.

We submit that it is clear from the foregoing that if this Court could now consider this question the decision thereon would have to be in our favor.

---

[32] But see *In re Christopher's Estate*, 35 N. E. (2d) 454, at 456 (Ohio).

CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed.

Dated: New York, January 26, 1946.

Respectfully submitted,

EDGAR M. SOUZA,
Counsel for Respondents.

ALVIN D. LURIE,
of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 505.

GEORGE C. HOLMBERG, FRANK C. BALL, CARL J. EASTERBERG, GEORGE F. HARDIE, and PAT B. MORRIS, on behalf of themselves and all other creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis,

Petitioners,

—against—

CHARLES ARMBRECHT; GILBERT MILLER, BARBARA RICHARDS MICHEL, MURIEL RICHARDS PERSHING and DOROTHY RICHARDS HIRSHON, as Executors under the Last Will and Testament of Jules S. Bache, deceased,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION OF CARL J. AUSTRIAN AND ROBERT G. BUTCHER, AS TRUSTEES OF CENTRAL STATES ELECTRIC CORPORATION, A DEBTOR IN REORGANIZATION, FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

AND BRIEF ON BEHALF OF TRUSTEES OF CENTRAL STATES ELECTRIC CORPORATION.

SAUL J. LANCE,
Attorney for Carl J. Austrian and Robert G. Butcher, Trustees, amici curiae,
61 Broadway,
New York, New York.

ISADORE H. COHEN,
Of Counsel.

THE COURT PRESS, N. Y. C.

INDEX.

	PAGE
Motion for Leave to File Brief as *Amici Curiae*	1
Brief for Carl J. Austrian and Robert G. Butcher, as Trustees of Central States Electric Corporation, Debtor, *Amici Curiae*	5
Opinions Below	5
Jurisdiction	6
Question Presented	6
Statement of the Case	7
I. The action was not barred because the cause of action accrued on April 20, 1935	9
II. In holding that the state statute of limitations must be applied regardless of any other circumstances, the Court of Appeals erred:	
(a) in failing to consider and give effect to the policy of the federal statute involved; and	
(b) in assuming that in all equity cases in a federal court special circumstances are no longer relevant in determining the staleness of the claim asserted	22

TABLE OF CASES CITED:

Adams v. *Nagle*, 303 U. S. 532 (1938) 13n
Allen v. *Mille*, 17 Wend. 202 (1837) 27n
Anderson v. *Abbott*, 321 U. S. 349 (1944) .33, 33n, 34, 35, 36n
Austrian, et ano. v. *Williams, et al.*, civil action file #32-149 2
Avery v. *Cleary*, 132 U. S. 604 ..... 30n
Bailey v. *Glover*, 21 Wall. 342 (1874), 25, 26, 27, 28, 30, 30n, 31
Bank of Alabama v. *Dalton*, 9 How. 522 ..... 25n

PAGE

Bauserman v. *Blunt*, 147 U. S. 647 ..... 25n
Bertine v. *Varian*, 1 Edw. Ch. 343 (1832) 27n
Brady v. *Daly*, 175 U. S. 148 (1899) 25n
Brusselbach v. *Arnovitz*, 87 Fed. (2) 761 (C. C. A. 6, 1936) 38n
Brusselbach v. *Cago Corp.*, 14 F. Supp. 993 (S. D. N. Y., 1936) 38n
Brusselbach v. *Cago Corp.*, 24 F. Supp. 524 (S. D. N. Y., 1938) 38n
Brusselbach v. *Cago*, 85 Fed. (2) 20 (C. C. A. 2, 1936) 38n
Brusselback v. *Chicago Joint Stock Land Bank*, 85 Fed. (2d) 617 (C. C. A. 7th, 1936) 37n

Callahan v. *Bailey*, 293 N. Y. 396 ..... 25n
Campbell v. *Haverhill*, 155 U. S. 610 (1895) 24, 31
Chattanooga Foundry & Pipe Works v. *City of Atlanta*, 203 U. S. 390 (1906) 25n
Christianson v. *Western Pacific Packing Co.*, 24 F. Supp. 437 (W. D. Wash., 1938) 29n
Christopher v. *Brusselback*, 302 U. S. 500 21
Christopher v. *Norvell*, 201 U. S. 216 11
Clearfield Trust Co. v. *United States*, 318 U. S. 363 (1943) 33, 36n
Committee for Holders of Central States Electric Corp., etc. v. *Kent, etc.*, 143 Fed. (2) 684 2

Davis v. *Elmira Savings Bank*, 161 U. S. 275 11
Davis et al. v. *Smokeless Fuel Co.*, 196 Fed. 753 (C. C. A. 2nd, 1912) 29n
Devoy v. *Superior Fire Insurance Co.*, 239 App. Div. 28 (1933) 25n
Dietrick v. *Greeney*, 309 U. S. 190 ..... 36n
D'Oench Duhme & Co. v. *F. D. I. C.*, 315 U. S. 447 (1942) 33, 36n

Engebretson v. *West*, 133 Neb. 846 (1938) 25n
Erie R. Co. v. *Tompkins*, 304 U. S. 64 ..... 8, 23, 29, 31
Exploration Co. v. *U. S.*, 247 U. S. 435 (1918) 16n, 30n

PAGE

Fisher v. *Whitton*, 317 U. S. 217 (1942) 36n
Forrest v. *Jack*, 294 U. S. 158 11
Fuller v. *Rock*, 125 Oh. St. 36 (1932) 25n

Guaranty Trust Co. v. *York*, 89 L. Ed. 1418,
6, 8, 22, 23, 24, 25n, 29, 31, 34, 35, 36, 38, 39
Gully v. *First Nat. Bank*, 299 U. S. 109 ..... 37n

Hall v. *Ballard*, 90 Fed. (2nd) 939 (C. C. A. 4th,
1937) 20, 21, 22
Herget v. *Central National Bank & Trust Company*,
324 U. S. 4 (1945) 25n, 39
Holmberg v. *Anchell*, 24 F. Supp. 594 (S. D. N. Y.,
1938) 8, 9, 10n, 38n
Holmberg v. *Armbrecht*, 150 Fed. (2) 829 2
Holmberg v. *Hannaford*, 28 F. Supp. 216 (S. D. Ohio,
W. D., 1939) 38n

Irving Trust Company v. *Day*, 314 U. S. 556 (1942) .. 36n
Isaac v. *Neece*, 75 Fed. 2nd 566 (C. C. A. 5th, 1935) .. 25n

Kalb v. *Feuerstein*, 308 U. S. 433 (1940) 36n
Key City, The, 81 U. S. 653 (1871) 29n
King v. *Pomeroy*, 121 Fed. 287 (C. C. A. 8th, 1903),
17, 18, 19, 20, 22
Kirby v. *Lake Shore & Michigan Southern Railroad*,
120 U. S. (1887) 7, 29, 31

L. & W. R. R. v. *Gardiner*, 273 U. S. 280 (1927) 25n
Lawrence Nat. Bank v. *Rice*, 83 Fed. (2d) 642 (C. C. A.
10th, 1936) 37n, 38n
Leffingwell v. *Warren*, 2 Black 599 ..... 25n
Lincoln Nat. Bank, etc. v. *De Courtney*, 14 F. Supp.
997 (S. D. N. Y., 1931) 38n

M'Cluny v. *Sullivan*, 3 Pet. 270 ..... 25n
McClaine v. *Rankin*, 197 U. S. 154 (1905) 25n
McDonald v. *Thompson*, 184 U. S. 71 (1902) 25n
Meeker v. *Lehigh Valley R. R.*, 236 U. S. 412 (1915) .. 30

O'Sullivan v. *Felix*, 233 U. S. 318 (1914) 25n

PAGE

Pan-American Trading Co. v. *Franquiz*, 8 Fed. (2) 500 (S. D. Fla., 1925) 29n
Partridge v. *Ainley*, 28 F. Supp. 472 (S. D. N. Y., 1939) 38n
Pufahl v. *Parks' Estate*, 299 U. S. 217 (1936) 38n

Rankin v. *Barton*, 199 U. S. 228 ..... 11, 32
Rawlings v. *Ray*, 312 U. S. 96 ..... 11, 13n, 32, 36n
Richle v. *Margolies*, 279 U. S. 218 ..... 38n
Rock v. *Bennett*, 155 Mass. 500 (1892) 25n
Rogers, Estate of, v. *Commissioner*, 320 U. S. 410 (1943) 36n
Rosenthal v. *Walker*, 111 U. S. 185 ..... 30n
Russell v. *Todd*, 309 U. S. 280 ..... 8, 10, 10n, 23, 28n, 31

Sheldon v. *Parker*, 66 Neb. 610 (1902) 25n
Smith v. *Allwright*, 321 U. S. 649 (1944) 36n
Sola Electric Co. v. *Jefferson Co.*, 317 U. S. 173 (1942) 33, 36n
Southwork, The, 128 Fed. 149 (E. D. Pa., 1904) 29n
Standard Oil Company v. *Johnson*, 316 U. S. 481 (1942) 36n

Todd v. *Russell*, 104 Fed. (2) 169 (C. C. A. 2nd. 1939) 38n
Traer v. *Clews*, 115 U. S. 528 ..... 30n
Troup v. *Smith*, 20 John. 33 (1822) 27n

United States v. *Allegheny County*, 322 U. S. 174 (1944) 36n
United States v. *Diamond Coal Co.*, 255 U. S. 323 (1921) 30n
United States v. *Miller*, 317 U. S. 369 (1943) 36n
United States v. *Pink*, 315 U. S. 203 (1942) 36n
Upton v. *McLaughlin*, 105 U. S. 640 ..... 30n

Wheeler v. *Greene*, 280 U. S. 49 ..... 8, 10n, 17, 36
Whyman v. *Wallace*, 201 U. S. 230 (1906) 37, 37n
Wragg v. *Federal Land Bank of New Orleans*, 317 U. S. 325 (1943) 36n

Other Authorities Cited:

	PAGE
Bankruptcy Act, Chapter X	1
Bankruptcy Act of 1867	26
Dawson, Fraudulent Concealment and Statutes of Limitation, 31 Mich. L. Rev. 875 (1933)	28n
Field Code	27
Judicial Code, §24	37n, 38
Judicial Code §240(a), 28 U. S. C. §347(a), as amended by the Act of February 13, 1925	6
Judiciary Code of 1789, §34	25, 29
New York Banking Law:	
Section 113a	13n
Section 632	13n
New York Revised Statutes (2 R. S. (1829) P. 301, Sec. 51)	27n
Rules of Decision Act	31, 32, 33
12 U. S. C. §63	16, 17
12 U. S. C. §65	17
12 U. S. C. §181	17
12 U. S. C. §812	8, 10, 11, 16, 17, 36
28 U. S. C. A. §41(16)	37n
28 U. S. C. A. §42	37n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 505.

GEORGE C. HOLMBERG, FRANK C. BALL, CARL J. EASTERBERG, GEORGE F. HARDIE, and PAT B. MORRIS, on behalf of themselves and all other creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis,

Petitioners,

—against—

CHARLES ARMBRECHT; GILBERT MILLER, BARBARA RICHARDS MICHEL, MURIEL RICHARDS PERSHING and DOROTHY RICHARDS HIRSHON, as Executors under the Last Will and Testament of Jules S. Bache, deceased,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Motion for Leave to File Brief as *Amici Curiae.*

To The Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The undersigned, as attorney for and on behalf of Carl J. Austrian and Robert G. Butcher, Trustees of Central States Electric Corporation, a Debtor in reorganization proceedings under Chapter X of the Bankruptcy Act, respectfully moves this Honorable Court for leave to file the accompanying brief as *amici curiae.*

Central States Electric Corporation is a Debtor in reorganization proceedings in the District Court for the Eastern District of Virginia. Some time in 1943, the former Trustees of the Debtor reported to the District Court that numerous wrongs and frauds had been perpetrated against the estate of the Debtor by certain persons, firms and corporations. They recommended, however, that no suit be instituted to redress these frauds because, in their opinion, the statutes of limitation of the states where suit could be instituted barred any relief.

The Court of Appeals for the Fourth Circuit did not agree with these views (see *Committee for Holders of Central States Electric Corp., etc.* v. *Kent, etc.*, 143 Fed. (2) 684) and an investigation was made by the present Trustees of the Debtor. As a result of that investigation an action was instituted in the District Court for the Southern District of New York to redress the wrongs and frauds done to the Debtor (see *Austrian, et ano.* v. *Williams, et al.*, civil action file #32-149).

In that action the defendants moved to dismiss the complaint on the ground, *inter alia*, that the only applicable statute of limitations was that of the State of New York and that under that statute the action was barred. This motion is pending decision. In the defendants' arguments and briefs the decision of the Court of Appeals for the Second Circuit in *Holmberg* v. *Armbrecht*, 150 Fed. (2) 829, was cited as holding that in *any* suit in a United States district court, the state statute of limitations is controlling regardless of the existence of any special circumstances.

Because a decision of that question in this case may have an important bearing on the litigation of the Trustees of Central States Electric Corporation, we deemed it appropriate to make this application for leave to intervene herein as *amici curiae* and submit the accompanying brief setting forth our views on the question involved in this case.

Counsel for petitioners have consented to the filing of this brief. Counsel for respondents have been requested to consent, but have refused.

January 8th, 1946.

SAUL J. LANCE,
Attorney for Carl J. Austrian and Robert G. Butcher, Trustees, amici curiae.

ISADORE H. COHEN,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 505.

GEORGE C. HOLMBERG, FRANK C. BALL, CARL J. EASTERBERG, GEORGE F. HARDIE, and PAT B. MORRIS, on behalf of themselves and all other creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis,

Petitioners,

—against—

CHARLES ARMBRECHT; GILBERT MILLER, BARBARA RICHARDS MICHEL, MURIEL RICHARDS PERSHING and DOROTHY RICHARDS HIRSHON, as Executors under the Last Will and Testament of Jules S. Bache, deceased,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR CARL J. AUSTRIAN AND ROBERT G. BUTCHER, AS TRUSTEES OF CENTRAL STATES ELECTRIC CORPORATION, DEBTOR, *AMICI CURIAE.*

Opinions Below.

The opinion of the United States District Court (R. 99)* has not been reported; the opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 113) is reported in 150 Fed. (2) 829.

* At the date of writing the record to be used in this Court had not yet been printed and was, accordingly, not available to us. The references we have used are to the pagination of the record on which the writ of certiorari was granted.

Jurisdiction.

The order and judgment of the Court of Appeals for the Second Circuit was filed July 13, 1945 (R. 122). The petition for a writ of certiorari was filed October 1945 and was granted on November 19, 1945 (R.). The jurisdiction of this Court rests upon Judicial Code §240(a), 28 U. S. C. §347(a), as amended by the Act of February 13, 1925.

Question Presented.

We do not agree with either the petitioners or the respondents in the statement of the question deemed to be presented by this record.

We think that the fundamental error of the Court of Appeals lies in its view of the scope of the decision of this Court in *Guaranty Trust Co.* v. *York*. The Court of Appeals took the *York* case as stating an ironclad rule that state statutes of limitation applied in all suits instituted in the federal courts, whether at law or in equity and regardless of the circumstances of the particular case. The Court of Appeals disregarded the *caveat* of this Court in the *York* case to observe, where proper, the "considerations relevant in disposing of questions that arise when a federal court is adjudicating a claim based on a federal law".

As a result the Court of Appeals

1. failed to consider the proper date when the assessment liability accrued—a federal question;

2. failed to investigate the existence of special circumstances alleged to affect the application of the state statute of limitations because it assumed

that in every federal equity suit, even one not based on diversity of citizenship, the doctrine of *Kirby* v. *Lake Shore etc. R.R. Co.* was no longer applicable;

3. failed to investigate the policy of the federal statute as bearing on the running of the state statute of limitations in cases of concealed ownership of stock of a federal land bank—a federal question.

In all of these circumstances the Court of Appeals erred as we now shall show.

Statement of the Case.

The Southern Minnesota Joint Stock Land Bank of Minneapolis closed its doors on May 2, 1932 (R. 34). This action was commenced in the District Court for the Southern District of New York by the service of process on the defendants[1] on November 17 and 18, 1943 (R. 1) to recover an assessment from Charles Armbrecht and Jules S. Bache, two stockholders of the Southern Minnesota Joint Stock Land Bank of Minneapolis (R. 19). The liability of Armbrecht is predicated on the registration of the stock in his name on the books of the bank. The liability of Bache rests on his ownership of the same block of 100 shares—Armbrecht being merely a nominee of the same shares. The facts that the bank closed its doors on May 2, 1932 and is now, and has for some indeterminate time, been insolvent (R. 19); the status of Armbrecht and Bache as nominal and real owners of the 100 shares of stock involved; and the necessity for an assessment

[1] Defendant Bache died on March 24, 1944; by stipulation his executors were substituted as parties defendant (R. 1, 2).

up to the full par value of $100 per share (R. 35), are not disputed. Dispute centers entirely around the question of the timeliness of the commencement of the action. Both Armbrecht and Bache pleaded the ten year New York statute of limitations as a bar to the suit (R. 16).

The record shows, and it is conceded on all sides, that in the liquidation in Minnesota a suit was instituted on July 28, 1932 to establish the necessity of the assessment and in that suit a decree was rendered on April 20, 1935 finding that the bank was insolvent, that its liabilities exceeded its assets to the extent of $4,264,687.39, "and that an assessment of 100% against all stockholders was necessary" (R. 34, 35, 46). Thereafter, and on October 19, 1935, a notice was mailed to Armbrecht advising him of his liability for the assessment and making demand for payment (R. 54, 101).

In the District Court and in the Court of Appeals the issue of the application of the New York statute of limitations was posed in terms of the scope of the rule in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, as explained in *Russell* v. *Todd*, 309 U. S. 280, and *Guaranty Trust Co.* v. *York*, 89 L. Ed. 1418. Since the action was, of necessity, brought in equity (*Wheeler* v. *Greene*, 280 U. S. 49), and since the underlying right, the cause of action for the assessment liability, was created by federal statute (12 U. S. C. §812) the District Court held that a state statute of limitations "was not recognized law" in the federal court (R. 103). The Court of Appeals held to the contrary. It pointed out that *where a state created right was being enforced*, under the rule in *Guaranty Trust Co.* v. *York* "there should be no distinction in

limitation periods in diversity cases between those arising under the federal court's equity powers and those arising in law * * *" (R. 119); that "no sound reason is offered why such a distinction should be made when, as here, *the right sought to be enforced is created by a federal statute* * * *" (R. 120; emphasis supplied), and that, accordingly, it was "unnecessary" to review the facts involved in the claimed inequitable conduct of Bache (R. 117)—it being the petitioners' contention that such facts rendered the state statute of limitations inapplicable.

This holding by the Court of Appeals is grounded on the assumption that the cause of action accrued on May 2, 1932—the date when the bank closed. If that is error and the cause of action did not accrue until April 20, 1935, the date of the Minnesota decree declaring the necessity for an assessment, then the order and judgment of the Court of Appeals must be reversed for the action would not have been barred on November 18, 1943, even if the New York ten year statute of limitations applies.

Therefore, the first question presented by the record is: when did the assessment liability accrue?

I.

The action was not barred because the cause of action accrued on April 20, 1935.

The Court of Appeals assumed that the date when the cause of action accrued was May 2, 1932, the day the bank closed its doors.[2] We do not agree. We believe that the cause of action accrued *at the earliest*

[2] Thus, the Court of Appeals, in the course of its opinion, referred to the fact that the action was commenced "eleven and one-half years after the bank's failure * * *" (R. 116).

on April 20, 1935,[3] the date of the decree in the Minnesota liquidation declaring the necessity for an assessment. On that basis the cause of action was only eight years old and was not barred in November, 1943. The judgment of the District Court therefore should have been affirmed on the ground set out in *Russell* v. *Todd*, 309 U. S. 280, 294.[4]

The statute (12 U. S. C. §812) which creates the liability of the stockholders of a federal land bank for an assessment, does not fix the date when the cause of action to recover the assessment accrues. This Court has not yet passed on the precise point, although it has, inferentially, at least, indicated that the date when the assessment liability accrues is not necessarily coincident with the date of the closing of the bank.[5] The question is therefore open.

---

[3] In the Court of Appeals counsel for defendants stated that "the bank failed on May 2, 1932. The cause of action accrued on that date. * * *". (*Brief for appellants in Court of Appeals, p. 7.*) The only authority cited was a statement to that effect by Woolsey, *D. J.*, in *Holmberg* v. *Anchell*, 24 F. Supp. 594, 601, which, in turn, cited no authority. * * * *Melius est petere fontes quam sectari rivulos.*

[4] "* * * but in this case laches has not been held to be a defense and the Court has not declined to give effect to a state statute shown to be applicable. * * *"

[5] In *Russell* v. *Todd*, 309 U. S. 280, the bank closed on September 1, 1927. On April 6, 1928 the Federal Farm Loan Board made a determination of insolvency and levied an assessment and gave notice thereof. Although *Wheeler* v. *Greene* established that the Federal Farm Loan Board had no authority to levy the assessment, nevertheless, the District Court in the *Todd* case found that the liability accrued not on the date the bank closed, but on April 6, 1928, the date the Farm Loan Board levied the assessment. Chief Justice Stone mentioned in passing in his opinion in *Russell* v. *Todd*, that it was "conceded" that the cause of action accrued on April 6, 1928 (309 U. S. 280, at p. 284). We do not claim that *Russell* v. *Todd* is a decision as to when the cause of action for the assessment accrued, but at least it is an indication that the date of accrual does not coincide with the date the bank closed its doors.

The liability of the stockholders of a federal land bank for an assessment is created by a federal statute (12 U. S. C. A. §812). The scope and extent of this liability is governed entirely by federal law—state law is irrelevant. (*Rankin* v. *Barton*, 199 U. S. 228, 232; *Christopher* v. *Norvell*, 201 U. S. 216, 225; see *Forrest* v. *Jack*, 294 U. S. 158, 162; cf. *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 284.) Accordingly, the question of the date of accrual of the liability of the defendants in this case must be determined by considerations relevant to the effectuation of the policy inherent in this federal statute. (*Rawlings* v. *Ray*, 312 U. S. 96.)

What is this policy? Obviously it is to provide an additional fund to pay the claims of creditors if the federal bank is insolvent and the total amount of its assets is insufficient to pay its liabilities. Payment of creditors is effected in a liquidation which follows the closing of a bank. The aim of such a liquidation of a closed bank is to marshal the assets, reduce them to cash and to make pro rata distribution amongst the creditors. A liquidation may result in full payment of all claims or it may result in a deficit. Only in the latter event does an assessment become necessary.

Obviously the liability for the assessment cannot accrue until the necessity therefor is established. The mere closing of the bank does not establish this. The bank may then be solvent. Insolvency may occur only sometime later and, indeed, may have its origin in some event subsequent to the closing of the bank, such as the bankruptcy of a substantial debtor or the de-

preciation in the value of its assets. It is easily conceivable, in the case of a bank whose assets are largely rested on local land values, that a poor crop, unfavorable weather or adverse market conditions could destroy assets entirely or render them nearly worthless.

If there is a deficit on the date of the closing of the bank, there is still no certainty on that date of the amount of the deficit. That will appear only in the course of the liquidation.

Even if the bank had been insolvent when it closed its doors, a rise in land values, together with a wise administration of the estate, could restore the assets to a point where solvency would be re-established.

A determination of the date of the accrual of the assessment liability will thus be seen to have a direct bearing on one of the fundamental objects of the federal statute—the amount which can be salvaged for creditors in the event of insolvency. If this date is arbitrarily fixed before there is an opportunity to determine the necessity for an assessment then it may result, in particular cases, in the destruction of the assessment liability and consequently in the frustration of the congressional policy evidenced by the statute. The only way to effectuate this policy is to establish a rule in the case of land bank liquidations that the cause of action on the assessment is deemed to accrue in each instance on the date when a decree is made in the liquidation that an assessment is necessary.

The liquidations of national and state banks furnish a fund of experience from which can be obtained the materials to fashion a workable rule for land banks. In an involuntary liquidation of a national bank, the determination of the necessity for an assessment and the amount thereof, is made by the Comptroller of the

Currency.[6] The cause of action accrues on the date the Comptroller declares the assessment to be due and payable.[7] This necessarily occurs sometime after the bank is closed and when the necessity for an assessment becomes clear. In leaving the determination of the necessity for an assessment to the Comptroller, the Congress has plainly shown that in its opinion this is an administrative matter to be determined as an incident of liquidation and governed by the peculiar facts of each separate liquidation.[8]

New York has a statute which was originally patterned on the federal statutes. The same experience is disclosed in the New York cases. There too the legislature was content to leave the fixing of the necessity for an assessment and the amount thereof to the State Superintendent of Banks.[9]

Congress could have expressly stated that in all instances the assessment liability in the case of federal land banks accrued on the date the bank closed. But it did not do so. And the reason lies in the nature of the liability. It is uncertain on the day the bank closes whether an assessment will be necessary; it is uncertain what the amount of the deficit will be. The experience gained in the liquidation of state and national banks shows that the assessment liability is an incident of liquidation and that the necessity for the liability, its amount, and the time of accrual vary in each case.

---

[6] *Adams* v. *Nagle*, 303 U. S. 532 (1938).

[7] *Rawlings* v. *Ray*, 312 U. S. 96 (1941).

[8] In *Adams* v. *Nagle*, 303 U. S. 532, 540, the Court said, "* * * The necessity for vesting this power in an administrative officer springs from the desirability of prompt liquidation. It would be intolerable if the Comptroller's decision could be attacked collaterally in every suit by a receiver against the shareholders to collect the amount of the assessment. It is settled this cannot be done. * * *"

[9] New York Banking Law, Sections 632, 113a.

A moment's reflection will show the propriety of this view of the assessment liability. When a bank closes and a new management takes over for purposes of liquidation, there is a certain chaotic period which almost always exists before the liquidation is set on its proper course. New people have to familiarize themselves with the bank's business, its affairs, the prospects of its debtors and the amount of its liabilities. At this stage of the liquidation the liquidators have to direct their entire attention to the organization of the liquidation. They are not ready to consider such matters as the enforcement of an assessment. It is only after the initial chaos has been resolved and a study has been made of the affairs of the bank that some appraisal can be made of the value of the assets as against the amount of the liabilities.

Even then great dispute and contrariety of opinion will exist. After all, solvency is a conclusion which is derived from a series of guesses as to the probable amounts which can be recovered from the bank's debtors; an appraisal of the value of security held by the bank for debts owing to it as this may be affected by conditions peculiar to the type of such security; a determination of the probable amount of its liabilities. Finality sufficient to determine the necessity of an assessment and the amount thereof cannot be reached until the liquidation has proceeded to a point where the liquidators are in a position to make a determination with respect to all these elements.

In the case of a national bank such a determination is made by the Comptroller. In the case of a New York bank the determination is made by the State Superintendent. In the case of a federal land bank where no provision has been made for a liquidator

comparable to the Comptroller or the Superintendent of Banks, the determination must be made by a court. Obviously, the same considerations pertaining to the determination of the necessity for an assessment when the liquidation is under the control of an executive agency are equally applicable when the liquidation is under the supervision of a court.

In this case the determination for the necessity and amount of the assessment was made by the District Court for the Minnesota District in which the liquidation proceeding was pending. That Court, as an incident of the liquidation, determined that an assessment was necessary in order to restore a deficit of some four million dollars. Then, for the first time, did the assessment liability become fixed. That was the date when the liability accrued. That date was April 20, 1935—less than ten years before the action against the defendants was commenced.

To prove that the statute of limitations should not begin to run on the cause of action for the stock assessment liability of the stockholders of this land bank until April 20, 1935, we shall turn to the cases which have arisen in connection with the *voluntary* liquidations of national banks. A consideration of these cases is decisive for two reasons. First, the statutes dealing with the respective stock assessment liabilities of stockholders of national banks in voluntary liquidation and the liability of stockholders of federal land banks are practically identical and create the same procedures and problems; second, both statutes were enacted by Congress. Moreover, the federal land bank statute was passed in 1916, 40 years *after* the one applicable to assessments of stockholders in the case of voluntary liquidations of national banks. If, therefore, it was held in connection with the na-

tional bank statute that the statute of limitations did *not* begin to operate until there was a decree of the Court in which the liquidation was pending fixing the necessity for an assessment, it follows that Congress must have intended the same construction in the case of joint stock land banks.[10] Certainly no reason can be suggested in view of the *identity* of the statutes and procedures provided in *both* cases why the same result as to the operation of the statute of limitations should not be followed.

That the statutes are identical will appear from the following comparison:

National Banks	*Land Banks*
12 U. S. C. §63.	12 U. S. C. §812.
The shareholders of every national banking association shall be held individually responsible, equally and ratably and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; * * *.	Shareholders of every joint-stock land bank organized under this chapter shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such bank to the extent of the amount of stock owned by them at the par value thereof, in addition to the amount paid in and represented by their shares.

[10] Cf. the analogous argument as to the interpretation of other statutes enacted by Congress in *Exploration Co.* v. *U. S.*, 247 U. S. 435 (1918).

National Banks

12 U. S. C. §65.

When any national banking association shall have gone into liquidation under the provisions of section 181 of this title, the individual liability of the shareholders provided for by section 63 of this title may be enforced by any creditor of such association, by bill in equity, in the nature of a creditor's bill, brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established.

Land Banks

The same procedure created by statute (12 U. S. C. §65) *for national banks was established judicially with respect to land banks by the decision in Wheeler* v. *Greene,* 280 U. S. 49.

When a national bank has gone into voluntary liquidation and an assessment against its stockholders becomes necessary, the local statute of limitations applicable to assessments does not begin to run until the necessity for an assessment has been judicially decided in an action instituted in the state where the national bank is located.

Thus, in *King* v. *Pomeroy,* 121 Fed. 287 (C. C. A. 8th 1903) the national bank went into voluntary liqui-

dation on April 6, 1891, at which time it was completely insolvent. On April 13, 1891, a creditor filed a bill praying for the appointment of a receiver of the assets and creditors of the bank. This relief was granted and the receiver entered upon his duties. In December 1898 he reported that unpaid liabilities of the bank existed in an amount in excess of $36,000 and he asked for directions with respect to the enforcement of the stockholders' liability. In the same suit a creditor intervened and asked the Court to declare the necessity of an assessment against the stockholders and appoint a receiver to collect the assessment. On February 12, 1900, the Court made an interlocutory decree in which it found that there was a necessity for an assessment to the extent of 38.84% of the par value of the stock. An action was then brought to recover from the defendant Pomeroy, a stockholder in the bank, the assessment so levied. The Circuit Court dismissed the bill resting its decision in part on the ground that the action was barred by the three year statute of limitations of the state of Kansas. In reversing the judgment below the Court of Appeals, per Sanborn, *J.*, said (at p. 297):

> "Another reason why this action ought not to be maintained is pressed upon our attention. It is that it was barred by the limitation of three years prescribed by the Code of Civil Procedure of Kansas, art. 3, § 18, subd. 2. This contention rests upon the argument that the bar of the statute cannot be postponed by the failure of a creditor to avail himself of any means within his power to prosecute or preserve his claim (*Bauserman* v. *Blunt*, 147 U. S. 657, 13 Sup. Ct. 466, 37 L. Ed. 316), and that the creditors were aware of the insolvency of the bank, and hence of the liability of its stockholders, and could have com-

menced their suit to enforce it as early as April 13, 1891; when the bill for the appointment of the receiver was filed. But the answer to this objection is that the suit to administer the affairs of the bank, commenced in 1891, was, like the proceedings of the comptroller in cases within his jurisdiction, a proceeding to ascertain and enforce the liability of the shareholders as well as to administer the tangible assets of the bank, because that ascertainment and enforcement was a part of the liquidation contemplated, so that no time ran against the creditors during the pendency of that proceeding.

* * * The result is that the cause of action which the receiver is now prosecuting in the case before us never accrued until 60 days after February 12, 1900, when the court ascertained the necessity, and ordered the payment of the 38.84 per cent of the par value of the stock 60 days after that date. There was no time prior to the order of February 12, 1900, when the extent of the liability of the shareholders of this bank was ascertained; no time when it was due. There was no time after April 13, 1891, when the suit in equity to liquidate the affairs of the bank was commenced when any creditor could have maintained a bill to enforce the liability of the shareholders, because the jurisdiction of the court which had already seized the assets and commenced to liquidate the obligations of the bank was exclusive. The result is that the bar of the statute has not arisen and this action may be maintained under the general rule that, in an action by a receiver to enforce the liability of a shareholder of an insolvent national bank whose affairs are in course of judicial administration in a proper proceeding in a federal court for the purpose of liquidating its debts, the liability of the shareholders of the bank does not

become due, does not mature, and the action to collect it does not accrue, until the court decides that it is necessary to collect some part of it, determines the amount, and fixes the time for its payment. *Deweese* v. *Smith,* 106 Fed. 438, 441, 45 C. C. A. 408, 410, 411, and cases there cited."

In *Hall* v. *Ballard,* 90 Fed. (2nd) 939 (C. C. A. 4th 1937), a national bank went into voluntary liquidation on May 20, 1926. On May 24, 1929 two creditors obtained judgments against the bank. Executions thereon were returned unsatisfied on August 22, 1929. On August 16, 1930, the judgment creditors filed an equity bill in the United States District Court against the stockholders to enforce their stock assessment liability. On July 17, 1934, a decree was rendered adjudging the stockholders liable for an assessment to the extent of the full par value of the shares owned by each of them and the receiver was directed to collect the assessment liability from the stockholders who were not served in the main equity bill. Action was then begun on July 25, 1935 against Ballard, a stockholder of the bank, to recover the assessment liability from him. Ballard pleaded that the action was barred by the statute of limitations of the State of West Virginia, and the district court sustained the plea. In reversing the judgment below the Court said (at p. 944):

"Therefore, the cause of action against appellee here never accrued until July 17, 1934, the date upon which the United States District Court for the Western District of Virginia, first ascertained the necessity and ordered the payment of 100 per cent. of the par value of the stock and appointed Leonard R. Hall receiver, who was ordered and directed on that date to collect the shareholders'

liability not to exceed $100 for each share owned by them.

Counsel for appellee contend, however, that the cause of action to enforce the individual liability of the stockholders of the Peoples National accrued on August 22, 1929, the date on which executions against the Peoples National were returned unsatisfied, that on that date the creditors were aware of the insolvency of the bank and the consequent liability of its stockholders, and an action could have been commenced on that date to enforce such liability, and rely for such contention upon the case of *Warner* v. *Citizens' Nat. Bank* (C. C. A.) 267 F. 661.

> It is true that liquidation and insolvency transform the potential liability of shareholders into one presently enforceable. * * * If the Comptroller of the Currency liquidates the bank, the liability is enforceable upon his direction by the suit of the receiver, and the cause of action accrues when the Comptroller makes the assessment and fixes the time for its payment. If the bank is in the course of voluntary liquidation the liability is enforceable by a suit in equity in the nature of a creditor's bill, and the right to bring such creditor's bill accrues when insolvency becomes manifest. * * * But, the statute of limitations does not begin to run in favor of the stockholder upon the insolvency of the bank, except, by analogy, as to the suit in equity to determine the amount of the liability."

It may be argued that the decision in *Christopher* v. *Brusselback*, 302 U. S. 500, is opposed to the conclusion of these cases. All that that case decided however was that as to land banks the decree in the liquidation suit has no extraterritorial force. This result simply requires that in states outside of the liquidation state

insolvency must be re-proved. But that does not alter the general rule that the date of accrual of the assessment liability is the date when in the liquidation proceeding it is determined that an assessment is necessary to pay the claims of creditors.

King v. *Pomeroy* and *Hall* v. *Ballard* show that the proper date of the accrual of the assessment liability of stockholders of land banks is that fixed by judicial decree in the liquidation proceeding of the bank. In the instant case that date, as fixed by the Minnesota Court, was April 20, 1935. The action having been brought in November, 1943 was therefore not barred by the New York ten year statute of limitations.

II.

In holding that the state statute of limitations must be applied regardless of any other circumstances, the Court of Appeals erred:

(a) in failing to consider and give effect to the policy of the federal statute involved; and

(b) in assuming that in all equity cases in a federal court special circumstances are no longer relevant in determining the staleness of the claim asserted.

If this Court should hold that the cause of action on the assessment liability accrued on May 2, 1932, the date of the closing of the bank, then the scope of the decision in *Guaranty Trust Co.* v. *York* becomes of paramount importance. In the *Guaranty* case the right involved was *state-created,* and the case came to the federal court solely by virtue of the diversity of citizenship of the parties. In the *present* case the right is federally created but it is not clear whether

the jurisdiction of the district court is based on diversity of citizenship or on the existence of a federal question.

While the Court of Appeals adverted to the fact that jurisdiction was here invoked on the ground of diversity of citizenship of the parties as well as the existence of a federal question, it did not go farther into the matter. The scope of its holding is thus uncertain. We do not know whether the Court of Appeals viewed the district court's jurisdiction as being *solely* grounded on diversity of citizenship, or whether it viewed the federal question involved as a sufficient ground in and of itself. It may be—we do not know—that the Court of Appeals felt that the diversity of citizenship of the parties furnished the *sole* basis for federal jurisdiction in this case, and that the instant case was essentially the same as the one presented in *Guaranty Trust Co.* v. *York*—both cases coming to the federal court solely on diversity grounds. Some basis for this view may be found in the Court's emphasis on the fact that the only distinction between this case and the *Guaranty* case was the difference between the sovereignties which created the right, in the *Guaranty* case, it being a state right which was being enforced, in the instant case, a federal right.

Clearly, it can be seen that there is a probability, in view of the decisions of this Court in *Erie R. Co.* v. *Tompkins*, *Russell* v. *Todd* and *Guaranty Trust Co.* v. *York*, that the nature of the federal jurisprudence involved may differ depending on the source of its jurisdiction. Since the *Tompkins* case, as subsequently expounded, has drawn a sharp cleavage between a *primary* federal jurisprudence and a *secondary* jurisprudence when the federal courts are merely

sitting as alternative substitutes for a state tribunal, it is of paramount importance, in order to understand the issues presented, to determine in what capacity the federal court is acting in a particular case, and whether it is expounding a primary federal jurisprudence or whether it is simply sitting as a substitute for a state tribunal and automatically applying state law.

Under this posture of the case we believe that the record requires the decision of the following questions:

(1) Is the federal court here exercising a jurisdiction primarily "federal" and thus expounding a "federal" jurisprudence? In such a case, in the absence of a federal statute of limitations is the court when passing on a case of equitable cognizance absolutely bound in all cases and without regard to special circumstances by a state statute of limitations? In other words, is the entire content of the ancient equitable doctrine of laches and of the ancient equitable bill to relieve against fraud or inequitable conduct removed from federal jurisprudence?

(2) Is the federal court exercising a jurisdiction primarily derivative—that is, one conferred solely by reason of the diversity of citizenship of the parties—and in that event is the rule in *Guaranty Trust Co.* v. *York* altered by the fact that the basic right here involved is federally created?

From the date of the decision in *Campbell* v. *Haverhill,* 155 U. S. 610 (1895) it has never been doubted that when Congress creates a right without at the same time specifying any applicable period of

limitation, all courts—federal as well as state—will apply the state statute of limitations locally applicable to the same or similar state created rights or causes of action.[11] In diversity suits in federal courts, state limitation statutes were held to be "rules of decision" within §34 of the Judiciary Code of 1789, and as such apply in "trials at common law".[12] But it was also never doubted that, in a proper case, a federally created period of limitation would override any state statute of limitation.[13]

And since the date of the decision in *Bailey* v. *Glover,* 21 Wall. 342 (1874), it has never been doubted that a federal statute of limitations would not begin to run in cases of concealed fraud or other inequitable conduct until the discovery of the facts relative to the fraud.

In *Bailey* v. *Glover, supra,* an assignee in bankruptcy filed a bill against the defendants to set aside certain fraudulent conveyances. The bill alleged that the defendants had kept their fraudulent acts secret and concealed them so that the facts were not discovered until within two years of the bringing of the bill. The defendants demurred on the ground that

---

[11] *Chattanooga Foundry & Pipe Works* v. *City of Atlanta,* 203 U. S. 390 (1906); *McDonald* v. *Thompson,* 184 U. S. 71 (1902); *O'Sullivan* v. *Felix,* 233 U. S. 318 (1914); *McClaine* v. *Rankin,* 197 U. S. 154 (1905); *Brady* v. *Daly,* 175 U. S. 148, 158 (1899); *L. & W. R. R.* v. *Gardiner,* 273 U. S. 280, 284 (1927).

[12] *Guaranty Trust Co.* v. *York,* 89 L. Ed. 1418, 1424, 1425, citing *M'Cluny* v. *Sullivan,* 3 Pet. 270; *Bank of Alabama* v. *Dalton,* 9 How. 522; *Leffin well* v. *Warren,* 2 Black 599; *Bauserman* v. *Blunt,* 147 U. S. 647.

[13] *Herget* v. *Central National Bank & Trust Company,* 324 U. S. 4 (1945); *Callahan* v. *Bailey,* 293 N. Y. 396; *Isaac* v. *Necce,* 75 Fed. 2nd 566 (C. C. A. 5th 1935); *Devoy* v. *Superior Fire Insurance Co.,* 239 App. Div. 28 (1933); *Engebretson* v. *West,* 133 Neb. 846 (1938); *Fuller* v. *Rock,* 125 Oh. St. 36 (1932); *Rock* v. *Bennett,* 155 Mass. 500 (1892); *Sheldon* v. *Parker,* 66 Neb. 610 (1902).

the action was barred by the two year statute of limitations contained in the Bankruptcy Act of 1867. In reversing the decree entered for the defendants on the demurrer, the Court said (at p. 347):

> "But the appellant relies in this court upon another proposition which has been very often applied by the courts under proper circumstances, in mitigation of the strict letter of general statutes of limitation, namely, that when the object of this suit is to obtain relief against a fraud; the bar of the statute does not commence to run until the fraud is discovered or becomes known to the party injured by it. * * *"

(at p. 349):

> "* * * And we are also of opinion that this is founded in a sound and philosophical view of the principles of the statutes of limitation. They were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure. And we see no reason why this principle should not be as applicable to suits tried on the common-law side of the court's calendar as to those on the equity side.
>
> While we might follow the construction of the State courts in this matter, where those statutes governed the case, in construing *this* statute of limitation passed by the Congress of the United

> States as part of the law of bankruptcy, we hold that when there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him."

This perspective has important overtones and implications: for what the Court was applying in *Bailey* v. *Glover* was, as the Court itself made plain, an ancient equitable power: the power contained within the old bill to relieve against fraud or inequitable conduct. Before the union of law and equity initiated by the Field Code about a century ago, it was a commonplace of the then current legal thinking that, in an action in a court of law, fraud or other inequitable conduct was no answer to a defense of limitations.[14] But if the defendant had caused the running of the statute by his own inequitable conduct, the plaintiff could obtain relief from the chancellor.[15]

The Field Code, and the codes generally, carried over this equitable power. And in the unitary code cause of action, the relief formerly obtained by way of the bill to relieve against fraud and inequitable conduct could be obtained and given effect by pleading in replication to a defense of limitations the same

---

[14] *Troup* v. *Smith*, 20 John. 33 (1822); *Allen* v. *Mills*, 17 Wend. 202 (1837).

[15] *Bertine* v. *Varian*, 1 Edw. Ch. 343, 347, 348 (1832). In New York, the chancellor's power was cast into statutory form even before the adoption of the codes. As early as 1829, the New York revised statutes (2 R. S. (1829) P. 301, Sec. 51) provided:

> "Bills for relief, on the ground of fraud, shall be filed within six years after the discovery, by the aggrieved party, of the facts constituting such fraud, and not after that time."

facts which would, before 1848, have moved the chancellor to issue his injunction against the pleading of a defense of limitations at law.[16]

The rule in *Bailey* v. *Glover, supra,* was merely an application *in the federal courts* of this historical remedy applied with respect to a federal statute of limitations.

With this background, it thus becomes easier to understand the true doctrine of laches in the federal courts. Before the union of law and equity, limitations did not apply *ex proprio vigore* in chancery. The doctrine of laches furnished the measure of time in actions in chancery. In ordinary cases, the chancellor would, in looking for the time-content of laches, accept the period otherwise applicable to the cause of action if the suit were brought at law.[17] But, just as he would not tolerate a defense of limitations at law where it would be inequitable to permit it, so, when the suit was before him, he would not accept the statute of limitations as a measure of time where it would be inequitable to do so. The facts which would induce the chancellor to reach this result in equity when the whole case was before him, were just the same as when the action had been brought at law and the only relief sought from the chancellor was relief against the defense of limitations because of the defendant's inequitable conduct.

However, the passage of time created confusion as to the content of this phase of the doctrine of laches, and it resulted in a neologism which ascribed to the doctrine of laches the content of the old equitable bill to relieve against fraud and inequitable conduct *in all cases even where no such special circumstances*

[16] See, generally on this subject, Dawson, Fraudulent Concealment and Statutes of Limitation, 31 Mich. L. Rev. 875 (1933).

[17] *Russell* v. *Todd*, 309 U. S. 280, 288.

existed. It was somehow felt that in equity the doctrine of laches even *in ordinary cases*, permitted the chancellor to disregard entirely periods of limitation otherwise applicable if the suit were brought at law.

In *Kirby* v. *Lake Shore & Michigan Southern Railroad*, 120 U. S. 130 (1887), the Court—leaving aside for the moment the impact of the Rules of Decision Act—properly applied the doctrine of laches.[18] There the local period of limitations was disregarded because of the defendant's inequitable conduct. The Court said (at p. 136):

> "* * * it is an established rule of equity, as administered in the courts of the United States, that, where relief is asked on the ground of actual fraud, especially if such fraud has been concealed, time will not run in favor of the defendant until the discovery of the fraud, or until, with reasonable diligence, it might have been discovered. *Meader* v. *Norton*, 11 Wall. 442, 458; *Prevost* v. *Gratz*, 6 Wheat. 481; *Michoud* v. *Girod*, 4 How. 503, 561; *Veazie* v. *Williams*, 8 How. 134, 149, 158; *Brown* v. *Buena Vista*, 95 U. S. 157; *Rosenthal* v. *Walker*, 111 U. S. 185, 190; 2 Story Eq. §1521a; Angell on Limitations."

Guaranty Trust Co. v. *York*, expounding the present view of section 34 of the Judiciary Act of 1789, adumbrated in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, holds that in cases which come to the federal court solely

---

[18] The admiralty cases have stated the rule in the same terms. See, *e. g.*, *The Key City*, 81 U. S. 653 (1871); *Christianson* v. *Western Pacific Packing Co.*, 24 F. Supp. 437, 439 (W. D. Wash. 1938); *Pan-American Trading Co.* v. *Franquiz*, 8 Fed. (2) 500, 501 (S. D. Fla. 1925); *The Southwork*, 128 Fed. 149 (E. D. Pa., 1904); *cf. Davis et al.* v. *Smokeless Fuel Co.*, 196 Fed. 753 (C. C. A. 2nd 1912).

by reason of the diversity of citizenship of the parties and where the federal court is sitting as an alternative state tribunal, the state's view as to laches and limitations must be applied. Thus, if the state court would not apply the old equitable bill to relieve against fraud or inequitable conduct in interpreting state statutes of limitation the federal court may not do so.

We thus see that:

1. A federal court expounding a federal jurisprudence will *in law actions* apply state limitations where Congress has not acted.[19]

2. A federal court expounding a federal jurisprudence will *in law actions* apply federal limitations where Congress has created such limitations. (*Herget* v. *Central National Bank & Trust Co., supra; Meeker* v. *Lehigh Valley R. R.*, 236 U. S. 412, 423 (1915).)

3. A federal court expounding a federal jurisprudence will in applying federal statutes of limitation invoke the ancient equitable bill to relieve against fraud or inequitable conduct in a proper case.[20] It will do so *in a law action* by allowing such facts to be pleaded as a replication to the defense of limitations.

Indeed it must follow that where a federal court is expounding a federal jurisprudence it will, when the case is of equitable cognizance, grant the same relief against inequitable conduct which is comprised in the doctrine of *Bailey* v. *Glover*, and which was

---

[19] See cases cited in note 11, *supra*.

[20] *Bailey* v. *Glover*, *supra*; *Rosenthal* v. *Walker*, 111 U. S. 185; *Tracy* v. *Clews*, 115 U. S. 528; *Exploration Co.* v. *United States*, 247 U. S. 435 (1918); *United States* v. *Diamond Coal Co.*, 255 U. S. 323 (1921); see *Avery* v. *Cleary*, 132 U. S. 604; cf. *Upton* v. *McLaughlin*, 105 U. S. 640.

correctly stated (the rule in diversity cases to the contrary notwithstanding) in *Kirby* v. *Lake Shore etc. R. R.* Accordingly, if Congress grants a right and confers primary jurisdiction to enforce that right on a federal court of equity, facts showing a defendant's inequitable conduct will be a proper reply to a defense that the action was not commenced within the time limited by a state, not a federal statute of limitations. It would be anomalous to hold *now* that the equitable power to relieve against fraud and inequitable conduct which was used by the Court as the basis for justifying a replication to the defense of limitations in *Bailey* v. *Glover*, does not exist in a federal equity court, the original source of that power.

Nor does *Campbell* v. *Haverhill* destroy the soundness of this conclusion. Although that case was said to be based on the Rules of Decision Act, it does not depend on that statute. As this Court recently said in *Russell* v. *Todd*, it would in the absence of a controlling act of Congress "without reference to the Rules of Decision Act adopt and apply local statutes of limitation which are applied to like causes of action by the state courts."

Nor does *Erie* v. *Tompkins* purport to destroy this power. Insofar as that case was based on the Rules of Decision Act, it was intended only to apply to diversity cases; and the recurring note in *Guaranty Trust Co.* v. *York* is that in *diversity* cases only must a federal equity court adopt the local rules as to limitations.

We understand these cases to establish this rule: In the ordinary case the federal court will take the state statute of limitations as the measure of time, both at law and in equity. However, the power which a federal equity court has, when expounding a primary

federal jurisprudence, to relieve against fraud and inequitable conduct in special cases still exists.

We do not think that it makes any substantial difference on what ground the federal court's power to relieve against fraud or other inequitable conduct is based when that power involves cases which are purely federal and which do not come to the federal courts on diversity grounds. It may be based on historical and constitutional grounds; it may be said to be found in the Rules of Decision Act insofar as that Act specifically excepts from its ambit cases where the "constitution * * * or statutes of the United States otherwise require and provide. * * *"

Or this rule may be predicated on the principle that in exclusively federal matters where a federal policy expressed in a federal statute would be nullified by state rule or decision the latter cannot stand. Indeed, this Court has refused to permit state statutes of limitation to affect federal power whenever conflict between the two arose. When the question was as to the accrual of a cause of action granted by a federal statute for the purpose of deciding when a state limitation statute began to run thereon, this Court refused to be bound by state decisions interpreting the state limitation statute. (*Rawlings* v. *Ray*, *supra*.) When the question was as to when the Comptroller of the Currency should have levied an assessment for the purpose of determining the application of a state limitation statute, this Court again struck down a state decision abridging the federal power (*Rankin* v. *Barton*, 199 U. S. 228).

These decisions reflect the principle that in purely federal matters state law is not controlling. Recent illustrations will be recalled. For example, a state can provide for the insulation of liability of stock-

holders through the corporate form. Yet, when this interfered with the effective enforcement of the assessment liability of stockholders of national banks, the state law was brushed aside.[21] We can see no substantial difference between a state statute of limitations and a state statute which permits the insulation of stockholders from the liability created by a federal assessment statute. If either state statute conflicts with the policy expressed in the federal statute, it will not stand.

At this point it may be noted that it makes no difference in substance whether the result in a particular case is reached as an exegesis on the policy of a particular federal statute or whether it is derived from an interpretation of the Rules of Decision Act. In a proper case the one will involve the other. All we desire to point out now is that in view of the recent statements of this Court in, *e. g.*, *D'Oench Duhme & Co.* v. *F. D. I. C.*; *Clearfield Trust Co.* v. *U. S.*; *Anderson* v. *Abbott*; *Sola Electric Co.* v. *Jefferson Co.*,[22] as to the ambit of federal power it would be inadvisable to consider the Rules of Decision Act as stating an imperative proposition for *all* cases without regard to the facts of particular cases as each one may arise.

We can envisage a case in which the congressional policy established in a federal statute requires the investigation and prosecution of corporate frauds; we can further see that in such a case the Congress may have vested jurisdiction of the suit primarily in a federal equity court. We can understand how in such a case frauds may be discovered for the first time long after the wrongs have occurred because the defendants concealed their own wrongful acts. We can see how in such a case the defendants may attempt to rely on

---

[21] *Anderson* v. *Abbott*, 321 U. S. 349 (1944).

[22] Cited in note 24, *infra*.

state limitation statutes. A state limitation statute applied in such a case would nullify the policy of the federal statute as effectively as the state incorporation statute would have done in *Anderson* v. *Abbott*. The mere fact that in the one instance the nullification of federal policy is accomplished by a state limitation statute should not alter the principle that a federal policy, federally expressed, will override state statutes.

On the other hand, state limitation statutes may ordinarily be applied to federal rights. Thus there may be a case in which no conflict between federal power and state limitation statutes exists and in such a case, the state limitation statute would apply. That would not mean that in a subsequent case such a conflict might not arise requiring the state law to bow to the federal policy expressed in the federal statute. Therein lies our dispute with the views of the Court of Appeals. Since a federal statute and the federal policy embodied therein are involved it was incumbent on the Court below to investigate those matters and to discuss their bearing on the issue. Thus the accrual of the cause of action here is a federal matter. The existence of the special circumstances relied on by the petitioners as removing the case from the bar of the state limitation statutes is a federal matter affecting the policy of the federal statute. The Court of Appeals did not discuss these matters because it deemed them irrelevant in view of its opinion of the scope of the rule thought to have been laid down in *Guaranty Trust Co.* v. *York*. We do not believe that the *Guaranty* case went so far. We believe that it is still incumbent on the federal court to determine whether, in view of the policy[23] contained in the federal statute here involved, an actual owner of the stock

[23] See discussion *supra*, p. 11 *et seq.*

of the land bank could for example avoid liability because of the ignorance of the creditors of the bank of the existence of the defendant's stockholder status. It may be pertinent to the federal policy expressed in the federal assessment statute to decide whether actual owners of stock can escape liability by permitting their stock to be carried in such a way on the books of the bank as to prevent discovery of their status until after limitations of time otherwise applicable have run.

It will be recalled that in *Anderson* v. *Abbott*, the formation of the holding company to hold the stock of a national bank was accomplished without any fraud. Yet, the Court, to effectuate the policy of the federal statute struck down the state-created corporation as a device for insulation from federal liability. So here, even though actual owners may, without fraud and in the regular course of business, permit their stocks to be registered on the books of the bank in the names of nominees, still in the effectuation of a federal policy it may well be held that the statute of limitations as to them does not begin to run until their stockholders' status is discovered.

This literal view of the scope of the rule in *Guaranty Trust Co.* v. *York* raises the second question which we adverted to at the outset of this discussion and which we believe is presented by the record: Suppose Congress creates a right but fails to confer jurisdiction on the federal courts to hear the case save as such jurisdiction may be invoked on the ground of diversity of citizenship of the litigants; in such a case is the federal court expounding a federal jurisprudence or is it, within the view of *Guaranty Trust Co.* v. *York*, sitting as an alternative state tribunal?

We leave to one side the fact that the *construction* of the federal statute raises and presents a federal question as to which the federal courts have the supreme power.[24] We are concerned only with this question: does the fact that the right was created by Congress, although the enforcement was left to the state courts (except in diversity cases), alter the rule laid down in *Guaranty Trust Co.* v. *York?*

The record discloses that in the instant case Congress created the right: the cause of action to recover the stock assessment liability of the stockholders of the bank (12 U. S. C. §812). The Court has said that this right may be enforced only in a court of equity (*Wheeler* v. *Greene, supra*). But it is not at all clear that Congress granted jurisdiction—apart from diversity—to the federal courts.

That the original liquidation suit in Minnesota would have presented a case "arising under the laws of the United States, and of which independently of the matter of diverse citizenship the (federal) Court

---

[24] The following is offered only as a *partial* list of the more recent cases where this Court has expounded this doctrine: *Dietrick* v. *Greeney*, 309 U. S. 190, 200, 201; *D'Oench Duhme & Co.* v. *F. D. I. C.*, 315 U. S. 447 (1942); *Clearfield Trust Co.* v. *United States*, 318 U. S. 363 (1943); *United States* v. *Allegheny County*, 322 U. S. 174, 183 (1944); *Anderson* v. *Abbott*, 321 U. S. 349, 365 (1944); *Smith* v. *Allwright*, 321 U. S. 649 (1944); *Estate of Rogers* v. *Commissioner*, 320 U. S. 410, 414 (1943); *Sola Electric Co.* v. *Jefferson Co.*, 317 U. S. 173 (1942); *Rawlings* v. *Ray*, 312 U. S. 96; *Fisher* v. *Whiton*, 317 U. S. 217 (1942); *Wragg* v. *Federal Land Bank of New Orleans*, 317 U. S. 325, 328 (1943); *United States* v. *Miller*, 317 U. S. 369, 379 (1943); *Standard Oil Company* v. *Johnson*, 316 U. S. 481 (1942); *United States* v. *Pink*, 315 U. S. 203, 217 (1942); *Irving Trust Company* v. *Day*, 314 U. S. 556, 561 (1942); *Kalb* v. *Feuerstein*, 308 U. S. 433, 438 (1940).

had jurisdiction * * *" is clear if a national bank were involved.[25] Whether that applies to the liquidations of federal land banks is not so clear. The federal incorporation of the land bank no longer is sufficient basis for access to the district courts.[26] Although one case has held that the rule in *Wyman* v. *Wallace* applies to liquidations of land banks[27] its discussion of this point does not dispel all doubt[28] especially in view of the more recent views of this Court as to when a case "arises" under federal law.[29]

In the case of *national* banks, Congress has specially conferred jurisdiction upon the district courts of all "cases for the winding up of the affairs of any such bank".[30] But no such grant appears with respect to *land banks* and it does not seem likely that the specific language in the statute will be deemed wide enough to apply to them.

When we come to the enforcement of the assessment liability we find that Congress has not specifically granted federal jurisdiction in cases involving the enforcement of the stock assessment liability of federal land bank stockholders. In the case of national banks the federal court's jurisdiction has been accepted as properly based on the federal nature of the

---

[25] *Wyman* v. *Wallace*, 201 U. S. 230, 242 (1906); voluntary liquidation of a national bank.

[26] 28 U. S. C. A. §42.

[27] *Brusselback* v. *Chicago Joint Stock Land Bank*, 85 Fed. (2d) 617 (C. C. A., 7th, 1936).

[28] *Wyman* v. *Wallace*, note 25, *supra*, would seem to rest more appropriately on the express grant of jurisdiction contained in the sixteenth, rather than the first, subdivision of Judicial Code, §24; See discussion in *Lawrence Nat. Bank* v. *Rice*, 83 Fed. (2d) 642 (C. C. A., 10th, 1936).

[29] See, *e. g.*, *Gully* v. *First Nat. Bank*, 299 U. S. 109, 112, *et seq.*

[30] 28 U. S. C. A. §41 (16).

office which the receiver, the enforcing officer, holds.[31] No such parallel can be found in land bank liquidations. Indeed the Court of Appeals for the Tenth Circuit has held[32] that in the closely analogous case of the voluntary liquidation of a national bank the members of its liquidating committee are not "officers of the United States" within the meaning of Judicial Code §24. But no definitive ruling appears to exist. The decisions in the various lower federal courts are confusing on the point; indeed counsel have reflected the uncertainty by invoking diversity of citizenship as a ground for jurisdiction.[33]

If we are correct in assuming that, although Congress created the right, it left its enforcement to state courts (save in diversity cases), the question remains as to whether the fact that the right was federally created should alter the rule in *Guaranty Trust Co.* v. *York*. The Court of Appeals did not think so.

---

[31] *Pufahl* v. *Parks' Estate*, 299 U. S. 217, 225 (1936).

[32] *Lawrence Nat. Bank* v. *Rice*, 83 Fed. (2) 642 (1936).

[33] *Cf. Brusselbach* v. *Cago Corp.*, 14 F. Supp. 993 (S. D. N. Y. 1936) (diversity and federal question involved; no comment by Court); *Lincoln Nat. Bank, etc.* v. *De Courtney*, 14 F. Supp. 997 (S. D. N. Y., 1931) (same); *Partridge* v. *Ainley*, 28 F. Supp. 472 (S. D. N. Y., 1939) (statement that case arises under federal law, without discussion); *Brusselbach* v. *Cago Corp.*, 24 F. Supp. 524 (S. D. N. Y., 1938) (same); *Holmberg* v. *Ancheff*, 24 F. Supp. 594 (S. D. N. Y., 1938) (same); *Holmberg* v. *Hannaford*, 28 F. Supp. 216 (S. D. Ohio, W. D., 1939) (no discussion); *Brusselbach* v. *Arnovitz*, 87 Fed. (2) 761 (C. C. A. 6, 1936) (diversity alleged; no comment by Court); *Brusselbach* v. *Cago*, 85 Fed. (2) 20 (C. C. A. 2, 1936) (no comment on point); *Todd* v. *Russell*, 104 Fed. (2) 169 (C. C. A. 2nd, 1939) (diversity and federal question, no comment by Court). If the original liquidation in Minnesota is properly bottomed on a federal jurisdiction which exists apart from the diversity of the citizenship of the parties, then the point suggests itself as to whether the jurisdiction in New York could in some way be bottomed primarily in the federal court on the doctrine of ancillarity (*Cf. Richle* v. *Margolies*, 279 U. S. 218, 223).

Perhaps, apart from the policy of the federal statute,[34] the rule of *Guaranty Trust Co.* v. *York* should apply. However, there is the question of the policy of the federal statute. There is, further, the question raised by the petitioners as to whether the state statute should be applied because of the special circumstances urged by them. It is our view that it was error for the Court below to have decided this case by a literal application of *Guaranty Trust Co.* v. *York* without any consideration of these various matters.

Respectfully submitted,

SAUL J. LANCE,
Attorney for Carl J. Austrian and Robert G. Butcher, Trustees, amici curiae.

ISADORE H. COHEN,
Of Counsel.

[34] See discussion, *supra*, pp. 11 *et seq.*

INDEX

CITATIONS

Cases:	Page
Austrian v. *Williams*, Civ. Action No. 32-149, S. D., N. Y.	12
Bailey v. *Glover*, 21 Wall. 342	3, 6, 12
Baird v. *Franklin*, 141 F. 2d 238, certiorari denied, 323 U. S. 737	11
Clark Lumber Co. v. *Kurth* (C. C. A. 9, decided Dec. 6, 1945)	2
Clearfield Trust Co. v. *United States*, 318 U. S. 363	10
Deitrick v. *Greaney*, 309 U. S. 190	9
D'Oench, Duhme and Co. v. *Federal Deposit Insurance Corp.*, 315 U. S. 447	8, 9
Elliott v. *Morrell & Co.*, 7 Wage and Hour Rept. 1012	2
Erie Railroad Co. v. *Tompkins*, 304 U. S. 64	12
Exploration Co. v. *United States*, 247 U. S. 435	3, 6
Fullerton v. *Lamm*, 163 P. (2d) 941	2
Guaranty Trust Co. v. *York*, 1944 Term, No. 264, decided June 18, 1945	3, 4
Republic Pictures Corporation v. *Kappler*, 151 F. (2d) 543	2
Russell v. *Todd*, 309 U. S. 280	3, 6, 8
Sola Electric Co. v. *Jefferson Electric Co.*, 317 U. S. 173	2
Statute:	
Federal Farm Loan Act of July 17, 1916, Sec. 16, 39 Stat. 374, 12 U. S. C. Sec. 812	1
Miscellaneous:	
H. R. Doc. No. 494, 64th Cong., 1st Sess.	8
S. Rep. No. 144, 64th Cong., 1st Sess., p. 4	8

650565—46

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 505

GEORGE C. HOLMBERG, ET AL., PETITIONERS

v.

CHARLES ARMBRECHT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

Although not a party to this suit, the United States is interested in the issue presented for two reasons. In the first place the case involves a federal statute (Federal Farm Loan Act of July 17, 1916, Sec. 16, 39 Stat. 374, 12 U. S. C. Sec. 812) imposing upon bank stockholders liability equal to the value of their stock, and the policy of that Act will be defeated if stockholders are able to escape liability by concealing their ownership while the statute of limitations runs. Secondly, the problem presented applies to many rights created by federal law which will be impaired to some extent by affirmance of the decision below.

The Securities and Exchange Commission in particular is confronted with situations in which the rights guaranteed by the statutes it administers may be defeated through the concealment of material facts from persons possessing a statutory right of action.

Although various other points have been raised in this case, we are concerned only with the question, decided by the Circuit Court of Appeals, whether a state statute of limitations applies to a federally created right without the equitable limitation for concealed frauds which this Court has read into federal statutes of limitation. Since the Circuit Court of Appeals assumed, in passing upon the above question, that Bache and Armbrecht had inequitably concealed Bache's true ownership of the stock during the period of limitations, we shall do the same.

The decisions of this Court establish that in the absence of a Federal statute of limitations, state statutes of limitations will ordinarily[1] be applied to federally created rights of action "when consonant with equitable principles".

[1] A state limitation which discriminates against rights accruing under federal law or which unreasonably interferes with the enforcement of a federal right will not be applied. *Republic Pictures Corporation* v. *Kappler*, 151 F. (2d) 543 (C. C. A. 8), appeal pending No. 723; *Elliott* v. *Morrell & Co.*, 7 *Wage Hour Reporter* 1012 (S. D. Iowa, 1944); *cf. Fullerton* v. *Lamm*, 163 P. (2d) 941 (Ore. 1945); *Clark Lumber Co.* v. *Kurth* (C. C. A. 9, decided Dec. 6, 1945); *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 176.

Russell v. *Todd,* 309 U. S. 280, 288, 293, and cases cited. *Guaranty Trust Co.* v. *York,* 1944 Term, No. 264, decided June 18, 1945, establishes that where in diversity cases there is no "claim based on a federal law", the state statute applies even though the result might be regarded as contrary to the principles of federal equity. On the other hand, *Bailey* v. *Glover,* 21 Wall. 342, and *Exploration Co.* v. *United States,* 247 U. S. 435 (and cases therein cited) establish that a federal equity court will read into a federal statute of limitations the qualification that "notwithstanding the positive terms of the statute, it did not begin to run until after the discovery of the fraud" (p. 447). These decisions leave open the status of a suit in equity upon a claim created by federal law where there is no federal statute of limitations and where there has been concealment.

The court below held that the *York* case applied to this situation. We believe (1) that this holding disregards the entire rationale of the *York* decision, and (2) that if a federal equity court will toll a Congressionally enacted statute of limitations to prevent frustration of a federal substantive statutory policy by concealment of a fraud, *a fortiorari* the application of state statutes of limitations to federal rights of action should be subject to the same qualification.

1. The court below admitted (R. 118) that this Court in the *York* case disclaimed deciding the status of rights based on federal law. The Court

nevertheless thought that "the rationale of the *York* case requires the application of the New York statute to this action", although based on a federal statute (R. 117), because that case emphasized the desirability of "the practical policy of uniformity embodied in *Erie R. Co.* v. *Tompkins*" (R. 121).

It is our view that the "practical policy of uniformity embodied in" the *Tompkins* case related solely to the distribution of judicial power between state and federal courts in diversity cases where the federal court is a special tribunal to administer the law of the state in which it sits. In such cases, where state law is being applied, "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies *Erie R. Co.* v. *Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result." (*Guaranty Trust Co.* v. *York*, Slip Opinion, p. 8–9.)

These considerations do not apply where, as in the instant case a right is derived from a federal statute. It is then more important that the policy of Congress be effectuated and that there be, so far as possible, uniformity in application throughout the nation than that there be uni-

formity between the state and federal courts in the same state. Obviously state policy would seem to be irrelevant in so far as the enforcement of a federal right is concerned. And if the federal rule were more liberal than that in a particular state, suits in that state would presumably be brought in the federal court, so that in practical effect the federal rule would be controlling in all the states and uniformity thereby obtained. This is much more desirable, as well as more in harmony with federal legislative policy, than that the result vary from state to state.

It is true that divergent results will not be entirely avoided, since, in the absence of a federal limitation, the state statute of limitations will normally prevail. In the absence of concealment this would not seriously impair the protection of federal rights. But certainly it is desirable that there be a uniform rule throughout the country as to whether concealment of essential facts tolls the period of limitation, and that the area of divergency in enforcing federal rights be as narrow as possible.[2]

---

[2] It is, of course, unnecessary to decide in this case whether when a federal right of action is the basis for suit in a state court the state court would be required to apply the federal rule with respect to equitable grounds for tolling the statute of limitations. Our point is merely that if the same rule must be applied in the federal and state courts sitting in the same state, the policy of uniformity and the substantive policy of Congress can both be effectuated only if the federal rather than the state rule prevails.

2. The same considerations of policy which have caused this Court consistently to rule that federal statutes of limitation do not run if the "plaintiff's ignorance of his rights" results from the "fraud or inequitable conduct of the defendant." (*Russell* v. *Todd*, 309 U. S., at 288–289n), should govern the present situation. The underlying basis for *Bailey* v. *Glover*, *Exploration Co.* v. *United States*, and similar cases is to prevent the defeat of the substantive policy embodied in the federally created right. In the *Bailey* case Congress had specifically provided in Section 2 of the Bankruptcy Act of 1867 that "no suit * * * in equity shall * * * be maintainable * * * unless the same shall be brought within two years from the time of the cause of action accrued for or against such assignee." 21 Wall., at 344. In the *Exploration Co.* case the pertinent statute provided that "suits to vacate and annul [land] patents hereafter issued shall only be brought within six years after the date of the issuance of such patents" (24 U. S., at 455). Nevertheless in the latter case this Court stated, in referring to the *Bailey* case that (247 U. S., at 447):

> This court, after a full review of decisions English and American, decided that, notwithstanding the positive terms of the statute, it did not begin to run until after the discovery of the fraud. In the course of the opinion Mr. Justice Miller said:

"They [statutes of limitation] were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure."

It will be observed in that statute, as in the one now under consideration, there was no provision that the cause of action should not be deemed to have accrued until the discovery of the fraud. But it was held that for the purpose of such statutes the cause of action did not accrue until the discovery of the fraud; and that such was the undisputed doctrine of courts of equity, and that the weight of authority, English and American, applied the same rule to actions at law.

Clearly the effectuation of the policy of the substantive federal statute involved in this case, imposing additional liability upon bank stockholders,[3] will be furthered if the inequitable con-

[3] The primary purpose of the Federal Farm Loan Act was to make available farm credit in the form of long-term mortgage loans not available from ordinary commercial

cealment of essential facts by the stockholders is not permitted to deprive the bank creditors of their right of recovery. Under the cases cited such concealment would be ineffective to protect the stockholders even though a period of limitations specifically imposed by federal statute had expired.

The state statutes of limitations applied by federal equity courts do not, of course, have the same binding effect as a federal law. The state statutes are not binding upon the courts in such cases but are followed only by way of analogy and comity, to the extent "consonant with equitable principles." *Russell* v. *Todd*, 309 U. S., at 288. Thus if the federal courts feel free, out of regard for federal legislative policy and principles of equity, to override or qualify an express limitation imposed by Congress, they are even more free to disregard state statutes of limitations in the same circumstances.

Under federal statutes a federal court may not apply a state policy as expressed in some local statute where the result would be contrary to the federal policy embodied in the particular federal statute involved. See *D'Oench, Duhme and Co.*

---

banks. To attract capital for the farm loan banks Congress relied primarily upon issuing low interest bearing bonds attractive to persons requiring "absolute safety." S. Rep. No. 144, 64th Cong., 1st Sess., p. 4; H. R. Doc. No. 494, 64th Cong., 1st Sess. The imposition of double liability upon stockholders (referred to in the Senate Report at p. 11) was obviously intended to increase the safety of these investments.

v. *Federal Deposit Insurance Corporation*, 315 U. S. 447;[4] *Deitrick* v. *Greaney*, 309 U. S. 190;

[4] Thus, even under the more limited view set forth in Mr. Justice Jackson's opinion in that case (315 U. S. at 465–475), examination of the federal policy is required:

"The immunity of such a [federal] corporation from schemes concocted by the cooperative deceit of bank officers and customers is not a question to be answered from considerations of geography. That a particular state happened to have the greatest connection, in the conflict of laws sense, with the making of the note involved, or that the subsequent conduct happened to be chiefly centered there, is not enough to make us subservient to the legislative policy or the judicial views of that state." (315 U. S. at 473.)

* * * * * * *

"The policy of the federal Act does not seem to me to leave dependent on local law the question whether one may plead his own scheme to deceive a bank's creditors and supervising authorities as against the Corporation. (315 U. S. at 474–475.)

* * * * * * *

"A federal court sitting in a non-diversity case such as this does not sit as a local tribunal. In some cases it may see fit for special reasons to give the law of a particular state highly persuasive or even controlling effect, but in the last analysis its decision turns upon the law of the United States, not that of any state." (315 U. S. at 471.)

* * * * * * *

"Federal law is no juridicial chameleon, changing complexion to match that of each state wherein lawsuits happen to be commenced because of the accidents of service of process and of the application of the venue statutes. It is found in the federal Constitution, statutes, or common law. Federal common law implements the federal Constitution and statutes, and is conditioned by them. Within these limits, federal courts are free to apply the traditional common-law technique of decision and to draw upon all the sources of the common law in cases such as the present. *Board of Commissioners* v. *United States*, 308 U. S. 343, 350." (315 U. S. at 471–2.)

Clearfield Trust Co. v. *United States,* 318 U. S. 363. It is submitted that a federal court unwarrantedly surrenders its proper function to construe federal statutes in accordance with the Congressional intention when it blindly follows a state limitation statute, the application of which will nullify the clear purpose of the federal legislation involved. Thus to follow such a local statute in asserted pursuance of a general policy of uniformity is to misconstrue the uniformity rule. Clearly the immunity of creditors of a federal joint stock land bank from schemes concocted by stockholders of the bank to avoid statutory liability is not a question to be answered from considerations of geography. The policy of Section 16 of the Farm Loan Act should not leave dependent on local law the question whether actual owners of stock can escape liability by permitting their stock to be carried in such a way on the books of the bank as to prevent discovery of their status until after limitations of time otherwise applicable have run.

A decision on the question here involved will, of course, affect many other federal rights, and it is because of its general consequences that we have submitted this brief. The effect upon private rights of action under those statutes administered by the Securities and Exchange Commission is illustrative. In those statutes Congress has attempted to regulate conduct and activities in many areas of the broad field of corporate

finance. In the case of certain statutory provisions giving rise to civil liability there are specific statements with reference to the periods of limitation applicable thereto. On the other hand, it has been recognized that private parties may bring civil actions for violation of other statutory provisions even though the statute does not specifically provide for such actions and, of course, does not prescribe a limitation period therefor. The right to bring such actions exists by reason of the general rule of law that members of a class for whose protection a statutory duty is created may sue for injuries resulting from its breach and that the common law will supply a remedy if the statute gives none. See *Baird* v. *Franklin,* 141 F. 2d 238 (C. C. A. 2 1944), certiorari denied, 323 U. S. 737.

The civil liabilities imposed by these statutes may well be accompanied by fraud or breach of fiduciary duty coupled with concealment of the facts which give rise to the causes of action. Furthermore, those injured by violation are frequently scattered and uninformed investors. There is likely to be considerable time lag before they obtain legal advice as to whether they may have a cause of action for investment loss. This is often the case even where the relevant information is available to the public. Further time may be required where the expense of litigation is disproportionate to the amount any one individual may have at stake, so that concerted

action is necessary. It is therefore patent that a state statute of limitations which applies regardless of concealment of pertinent facts and the consequently late discovery thereof can very well defeat the entire purpose of the federal statute.[5]

In view of the foregoing, we submit that a federal court must disregard a state statute of limitations where its application would have the effect of thwarting the policy of the federal statute giving rise to the right upon which the action is based. The federal court should apply instead such principles of general federal law as are consistent with the policy of the federal

---

[5] The pending case of *Austrian* v. *Williams*, Civ. Action No. 32–149 (S. D. N. Y.), referred to in the brief filed by the trustees of Central States Electric Corporation as *amici curiae* presents a related problem. That case involved the application of a federal statute of limitation (Bankruptcy Act, § 11 (e), 11 U. S. C. § 29e) interpreted in the light of the doctrine in *Bailey* v. *Glover*, 21 Wall 342, to a right of action which the bankruptcy law vests in the trustee but which is ultimately derived from rights of the bankrupt under state law—although in that case not under the law of the forum whose limitation was invoked but under the law of another state in which the right of action was not barred. The defendant there is contending that the case is governed by the decision below in this case and by this Court's decision in the *York* case. Inasmuch as the period of limitation in the *Williams* case is prescribed by federal law, the question there presented is clearly distinguishable from that involved here. Each case, however, raises the general problem as to the extent to which the uniformity concept embodied in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, should be regarded as controlling with respect to tolling a statute of limitations on equitable grounds in a field which is the subject of federal regulation but as to which the federal statute is not explicit.

statute. The legal rationale for such a rule has a sound foundation in the decisions of this Court, and can be articulated either in terms of the rule that a federal equity court will not apply a state statute to an action involving a federally created right where defendants have inequitably concealed pertinent facts relating to the cause of action, or in terms of the established principle that in any action on a right created by a federal statute a federal court will not blindly follow local statutes where to do so would defeat the federal policy contained in the federal law.

CONCLUSION

For these reasons it is respectfully submitted that the judgment below should be reversed.

J. HOWARD MCGRATH,
Solicitor General.
ROBERT L. STERN,
Special Assistant to the Attorney General.
ROGER S. FOSTER,
Solicitor
MILTON V. FREEMAN,
Assistant Solicitor
ARNOLD R. GINSBURG,
Attorney,
Securities and Exchange Commission.

JANUARY 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946

SUPREME COURT OF THE UNITED STATES.

No. 505.—October Term, 1945.

George C. Holmberg, Frank C. Ball, Carl J. Easterberg, et al., on behalf of themselves and all other creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis, Petitioners,
vs.
Charles Armbrecht and Gilbert Miller, Barbara Richards Michel, et al., as Executors under the last will and testament of Jules S. Bache, deceased.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 25, 1946.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This is a suit in equity by petitioners on behalf of themselves and all other creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis to enforce the liability imposed upon shareholders of the Bank by § 16 of the Federal Farm Loan Act, equal to one hundred percent of their holdings. 39 Stat. 360, 374, 12 U. S. C. § 812.[1] The Bank closed its doors in May, 1932. Its debts exceeded its assets by more than $3,000,000, the amount of its outstanding stock. Suit was accordingly brought in the United States District Court for the District of Minnesota for determining and collecting the assessment due under § 16. *Holmberg* v. *Southern Minnesota Joint Stock Land Bank of Minnesota*, 10 F. Supp. 795. Armbrecht, a New York stockholder, was sued there. The suit failed on procedural grounds and was dismissed without prejudice to further action. *Holmberg* v. *Anchell*, 24 F. Supp. 594, 598. Not until 1942, so it is alleged, did petitioners learn that Jules S. Bache had concealed his ownership of one hundred shares of the Bank stock under the name of Charles Arm-

[1] "Shareholders of every joint stock land bank organized under this Act shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such bank to the extent of the amount of stock owned by them at the par value thereof, in addition to the amount paid in and represented by their shares."

brecht. The present action against Armbrecht and Bache was begun in the Southern District of New York in November, 1941. Bache died during pendency of the suit and his executors were substituted as parties.

The respondents made two defenses: (1) they invoked a New York statute of limitation barring such an action after ten years. New York Civil Practice Act, § 53; (2) they urged laches, claiming that petitioners had unduly delayed commencement of the suit. Neither defense was sustained in the District Court, and judgment went against the respondents. The judgment was reversed by the Circuit Court of Appeals. 150 F. (2d) 829. That court did not reach the defense of laches because it held, relying on *Guaranty Trust Co.* v. *York*, 326 U. S. 99, that the New York statute of limitation was controlling and that the mere lapse of ten years barred the action. Since the case raises a question of considerable importance in enforcing liability under federal equitable enactments, we brought it here for review. 326 U. S. —.

In *Guaranty Trust Co.* v. *York*, *supra*, we ruled that when a State statute bars recovery of a suit in a State court on a State-created right, it likewise bars recovery of such a suit on the equity side of a federal court brought there merely because it was "between Citizens of different States" under Art. III, § 2 of the Constitution. The amenability of such a federal suit to a State statute of limitation cannot be regarded as a problem in terminology, whereby the practical effect of a statute of limitation would turn on the content which abstract analysis may attribute to "substance" and "procedure." We held, on the contrary, that a statute of limitation is a significant part of the legal rules which determine the outcome of a litigation. As such, it is as significant in enforcing a State-created right by an exclusively equitable remedy as it is in an action at law. But in the *York* case we pointed out with almost wearisome reiteration, in reaching this result, that we were there concerned solely with State-created rights. For purposes of diversity suits a Federal court is, in effect, "only another court of the State." *Guaranty Trust Co.* v. *York*, *supra*, at 108. The considerations that urge adjudication by the same law in all courts within a State when enforcing a right created by that State are hardly relevant for determining the rules which bar enforcement of an equitable right created not by a State legislature but by Congress.

If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive. See, *e. g.*, *Herget* v. *Central Bank Co.*, 324 U. S. 4. The rub comes when Congress is silent. Apart from penal enactments, Congress has usually left the limitation of time for commencing actions under national legislation to judicial implications. As to actions at law, the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitation. See *Campbell* v. *Haverill*, 155 U. S. 610; *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U. S. 390; *Rawlings* v. *Ray*, 312 U. S. 96. The implied absorption of State statutes of limitation within the interstices of the federal enactments is a phase of fashioning remedial details where Congress has not spoken but left matters for judicial determination within the general framework of familiar legal principles. See *Board of Comm'rs* v. *United States*, 308 U. S. 343, 349-50, 351-52.

The present case concerns not only a federally-created right but a federal right for which the sole remedy is in equity. *Wheeler* v. *Greene*, 280 U. S. 49; *Christopher* v. *Brusselback*, 302 U. S. 500; *Russell* v. *Todd*, 309 U. S. 280, 285. And so we have the reverse of the situation in *Guaranty Trust Co.* v. *York*, *supra*. We do not have the duty of a federal court, sitting as it were as a court of a State, to approximate as closely as may be State law in order to vindicate without discrimination a right derived solely from a State. We have the duty of federal courts, sitting as national courts throughout the country, to apply their own principles in enforcing an equitable right created by Congress. When Congress leaves to the federal courts the formulation of remedial details, it can hardly expect them to break with historic principles of equity in the enforcement of federally-created equitable rights.

Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief. Such statutes have been drawn upon by equity solely for the light they may shed in determining that which is decisive for the chancellor's intervention, namely, whether the plaintiff has inexcusably slept on his rights so as to make a decree against the defendant unfair. See *Russell* v. *Todd*, *supra*, at 289. "There must be conscience, good faith, and reasonable diligence to call into action the powers of the court." *McKnight* v. *Taylor*, 1 How. 161, 168. A federal

court may not be bound by a State statute of limitation and that court may dismiss a suit where the plaintiffs' "lack of diligence is wholly unexcused; and both the nature of the claim and the situation of the parties was such as to call for diligence." *Benedict* v. *City of New York*, 250 U. S. 321, 328. A suit in equity may fail though "not barred by the act of limitations." *McKnight* v. *Taylor, supra*; *Alsop* v. *Ritter*, 155 U. S. 448.

Equity eschews mechanical rules; it depends on flexibility. Equity has acted on the principle that "laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties." *Galliher* v. *Cadwell*, 145 U. S. 368, 373; see *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483, 488-89. And so, a suit in equity may lie though a comparable cause of action at law would be barred. If want of due diligence by the plaintiff may make it unfair to pursue the defendant, fraudulent conduct on the part of the defendant may have prevented the plaintiff from being diligent and may make it unfair to bar appeal to equity because of mere lapse of time.

Equity will not lend itself to such fraud and historically has relieved from it. It bars a defendant from setting up such a fraudulent defense, as it interposes against other forms of fraud. And so this Court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and "remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered though there be no special circumstance or effort on the part of the party committing the fraud to conceal it from the knowledge of the other party." *Bailey* v. *Glover*, 21 Wall. 342, 348; and see *Exploration Co.* v. *United States*, 247 U. S. 435; *Sherwood* v. *Sutton*, 5 Mason 143.

This equitable doctrine is read into every federal statute of limitation. If the Federal Farm Loan Act had an explicit statute of limitation for bringing suit under § 16, the time would not have begun to run until after petitioners had discovered, or had failed in reasonable diligence to discover, the alleged deception by Bache which is the basis of this suit. *Bailey* v. *Glover, supra*; *Exploration Co.* v. *United States, supra*; *United States* v. *Diamond Coal Co.*, 255 U. S. 323, 333. It would be too incongruous to confine a

federal right within the bare terms of a State statute of limitation unrelieved by the settled federal equitable doctrine as to fraud, when even a federal statute in the same terms would be given the mitigating construction required by that doctrine.

We conclude that the decision in the *York* case is inapplicable to the enforcement of federal equitable rights. The federal doctrine applied in *Bailey* v. *Glover*, *supra*, and in the series of cases following it, governs. When the liability, if any, accrued in this case, *cf. Rawlings* v. *Ray*, *supra*, at 98, and whether the petitioners are chargeable with laches, see *Foster* v. *Mansfield, Coldwater & c. Railroad*, 146 U. S. 88, 99; *Southern Pacific Co.* v. *Bogert*, *supra*, at 488, are questions as to which we imply no views. We leave them for determination by the Circuit Court of Appeals to which the case is remanded.

Reversed and remanded.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Justice RUTLEDGE, concurring.

I agree with the result and with the opinion, reserving however any intimation, explicit or implied, as to the full scope to which the doctrine of *Guaranty Trust Co.* v. *York*, 326 U. S. 99, may be applied in diversity cases. Many of the considerations now stated by the Court for refusing to extend that doctrine to cases concerning federally created rights, relating to the flexibility of remedies in equity either to cut down or to extend the state statutory period of limitations, seemed to me to be applicable whenever a federal court might be asked to extend the aid of its equity arm, whether in its diversity jurisdiction or other. The ruling in the *York* case however may be accepted generally for diversity cases and, moreover, rejected for extension to cases of this sort, without indicating that there may not be some cases even of diversity jurisdiction to which federal courts may not be required to apply it. With this reservation I join in the Court's action.